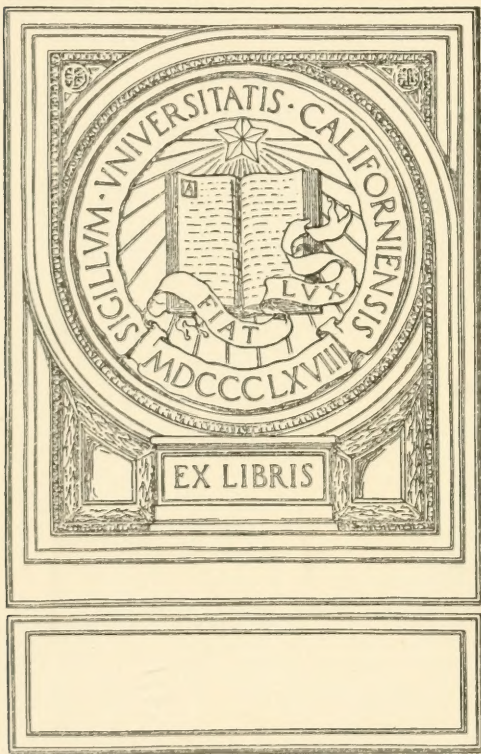


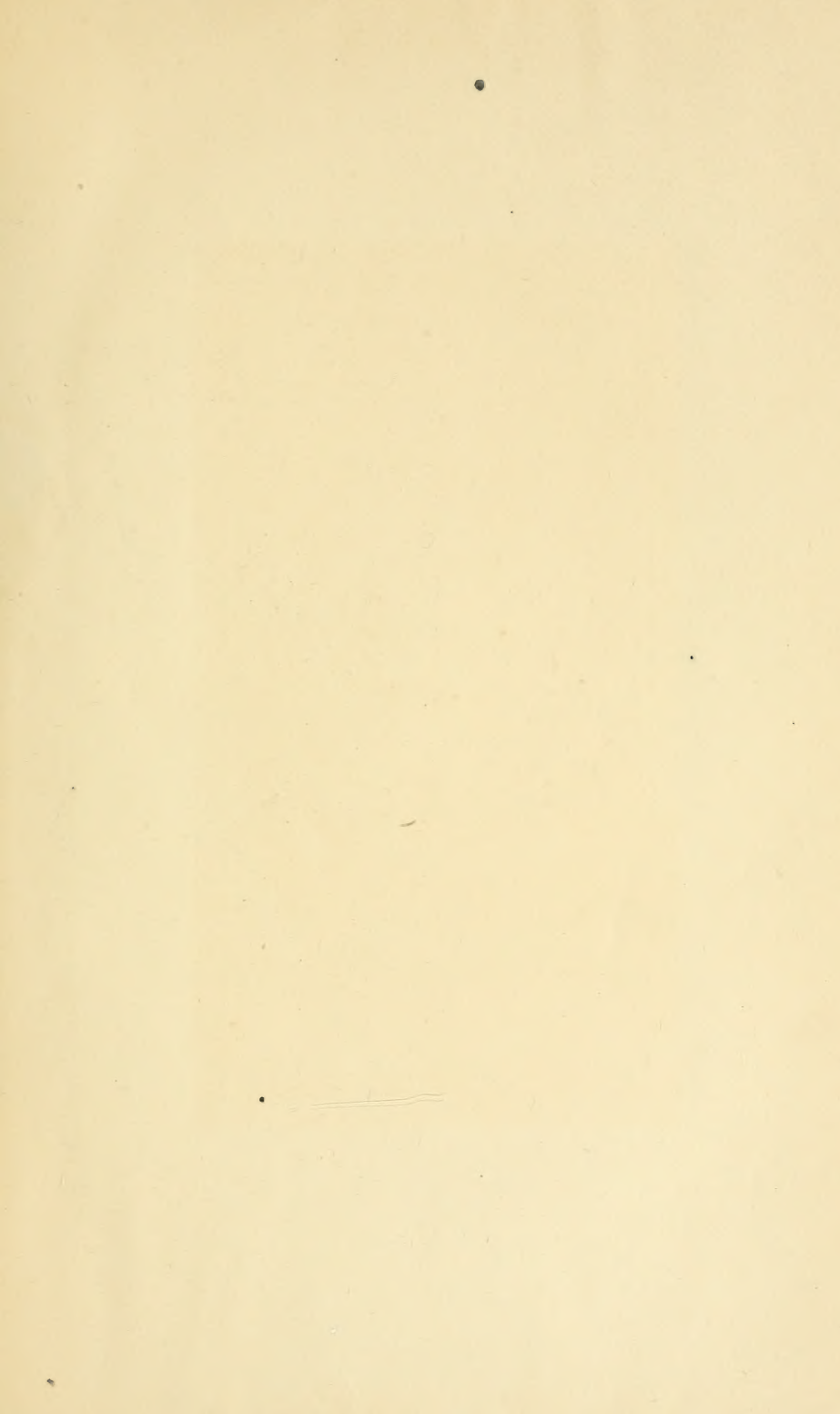




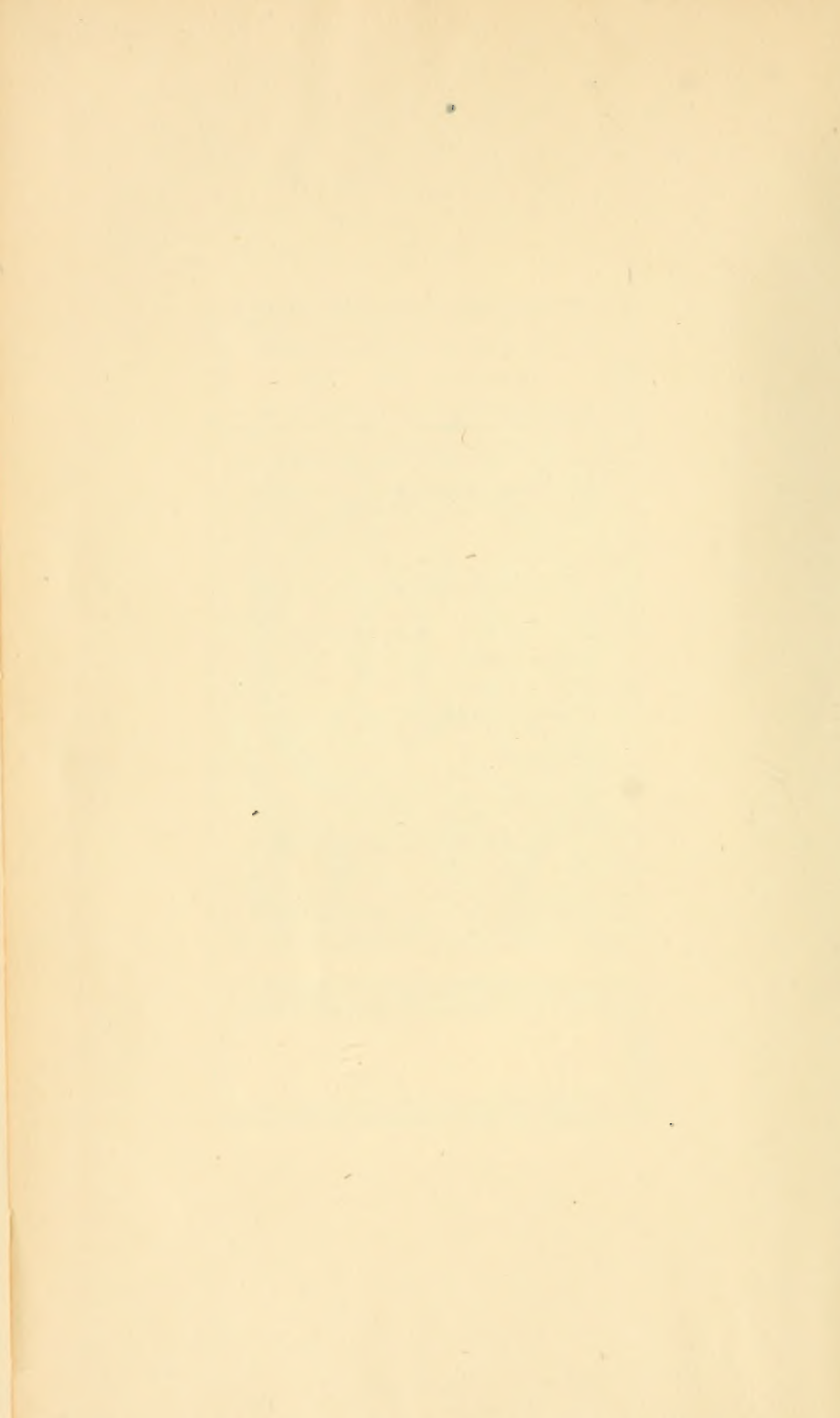
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POLITICAL SCIENCE.

VOL. II.





# POLITICAL SCIENCE

OR

## THE STATE

*THEORETICALLY AND PRACTICALLY CONSIDERED*

BY

THEODORE D. WOOLSEY

LATELY PRESIDENT OF YALE COLLEGE

VOLUME II.

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# POLITICAL SCIENCE.

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## Part 3.—*Continued.*

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### THE STATE.—PRACTICAL POLITICS.

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#### CHAPTER IV.

##### ARISTOCRACY.

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###### § 177.

HISTORY offers us few examples of aristocratical states compared with the number of nations ruled by kings, and of those few the greater part have been short-lived and transitory. Most of these examples are supplied by small communities which ere long changed their forms of government and became democracies, or were merged into monarchies. Some have taken the opposite course ; the principle of monarchy becoming weak, gave way, as we have seen, to a powerful nobility, who broke it up into fragments, until, in a new state of things, they could not maintain themselves against the impulse towards a stronger, more national government. We are entitled, by deductions from history, to lay down the principle that aristocracy is ordinarily capable of no long continuance, when it is the sole governing, or by far the strongest power in the state. A body of nobles, equals, rivals, jealous, cannot act with any long concert, and are not adequate to the demands made upon them by the administration of a large country. They



generally destroy their own power by factions, and disgust the lower classes by haughtiness; or one faction unites with these against another, thus modifying and perhaps destroying the constitution.

A different subject comes before us when aristocracy, as a power or order in a state, *existing by the side of other orders*, is called up for consideration. Some of the most vigorous nations have had an infusion of this element in their constitutions, and the relations of a nobility to royal power and to democracy, as well as the exact place it has occupied in developing national character and strength, are second in importance to few subjects in political science. After briefly treating of aristocratical governments we will consider this, so far as it has not been considered already in connection with other forms of government.

### § 178.

In Greece, as we have seen, a *basileus*, or king of the earlier type, must have existed in every independent community of the earliest historic and prehistoric ages, with a body of privileged men by his side, the chief men of the little state. In almost every city-state a time came when the kingly power ceased, and the chief power passed into the hands of a moderate number of families of ancient descent and of considerable possessions. The genealogies of the well-born sometimes went back into the mythic period. Thus a man of Gythium in Laconia, to whom honors are decreed by the people of the place, is described on an inscription as being a descendant in the thirty-ninth generation from the Dioscuri, and in the forty-first from Hercules. The distinction made by Aristotle (Pol., iii., 5, § 4), between *aristocracy*—so called because the government is in the hands of the best, or because they govern for the greatest good of the state and of their associates—and *oligarchy*, which aims at the interests of the wealthy, may be neglected by us as we consider the states which are governed by a privileged few. When these few are of ancient extraction, of considerable

Aristocracy or oligarchy in Greece.

wealth, and in the enjoyment of high consideration among the people, the government will often be mild and patriotic. But where another class arises of newly enriched families who demand privileges which are denied them by the old families, or where a few, a faction, and that a suspicious faction, have possession of power and wield it selfishly, such governments we describe as oligarchies. But there is no marked line separating the two types.

The names given by the Greeks to the members of this upper class, varied greatly in different communities. Sometimes they are called *eupatridæ*, or by other names denoting birth (as *εὐγενεῖς*, well-born), or are described by their property (as the rich, *the well to do*, *εὐποροί*), or the land-owners, if so we may translate the word *γάμοροι*, those who had a portion of the land, a name for this class in Samos, and at Syracuse as late as the Peloponnesian war. Their names again might be derived from their position or their culture. Of this kind were the titles, the *best*, *ἄριστοι*, and the *καλοὶ κάγαθοί*, which were used also at Athens in the times of the democracy to denote the upper, more respectable part of society. Other names came from the kind of military service which they performed. Thus they were known in some places as horsemen (*ἵππεῖς*), since the keeping of a horse in Greece implied a higher than the ordinary amount of wealth, or possibly as *hoplites*,\* since the heavy-armed soldier needed servants in war to hold his shield, and perform other offices. All these ways of denoting the governing class run back to the possession of wealth, especially of land, and to birth, which in time was held in less and less honor. Wealth then remained with the privileges which it brought with it, as the basis of an oligarchy, and when commerce grew up in favored cities and placed wealth in new families, these, in course of time, began to feel that they were equal to the old *eupatridæ*. It was natural and common for the upper class to avoid marriages with the new families, but this usage being broken

\* Comp. Aristot. Pol., vi., or iv., 10, § 10, and vi., or iv., 3, § 4.

through, at length the lines between classes began to disappear. At Corinth, the Bacchiadæ, a house claiming descent from Hercules, would not marry even with the other less distinguished noble families, and held the power of the state in their hands. One of the daughters of this sept, however, having become the wife of a man pertaining to another high-born family, gave birth to Cypselus, who, vexed by his exclusion from offices of state, and procuring a band of partisans among the people, overthrew the power of his mother's family, and secured for himself the sway over Corinth. (Herodot., v., 92, Nic. Damasc., vii., frag., 50.)

Aristotle (Pol., vi., or iv. 6, § 5) finds only two elementary principles in aristocracy—wealth and virtue (*ἀρετή*, manhood comprehending talent). Good birth is only wealth and virtue of old standing. Families are thus founded which perpetuated themselves by the wealth laid up by ancestors. The early times of society are peculiarly favorable for the advance of men whose qualities far surpass those of their fellows; by conquest or services to the community, they gain wealth in land which increases in value with the increase of population. The family wealth gives leisure and opportunity to excel in bodily exercise, arms and personal accomplishments fit for a freeman. Thus the position in the community once acquired is kept up. Poetic myths, deducing their race from a divine ancestor, added to their exaltation.

In every Greek state there were *phylæ*, or tribes and subdivisions of tribes. These made up the community, and no one could have political rights who was not a member of a tribe, unless admitted by adoption or general consent.

The ordinary constitution of the Greek oligarchies provided for an assembly and a council like that of the democracies, but the assembly was composed of such as had a certain amount of property, and the council often consisted of members who had reached a certain advanced age, or of those who held their offices for life. Frequent, especially annual elections, were marks of a democracy, and the use of the lot of extreme democracy. In some places a twofold council is

said to have existed ; one smaller in number than the other. But it is difficult to decide whether the larger council may not have been the same as the assembly of all the citizens having right of suffrage. In Elis the *gerusia* consisted of ninety members ; in Cnidus, of sixty exempt from all control ; in Epidaurus, the council of the *artyni*, or *artynæ*, was a detachment or committee selected from a hundred and eighty men, who would thus constitute the larger council ;\* in Marseilles, a committee of fifteen from a body of six hundred,† a number, which in so considerable a place would scarcely contain the whole body of wealthy citizens. In other places a body of a thousand is spoken of, which, if they did not include the entire number of citizens with full privilege, would be a great council with at least one small council over them. Besides these bodies which prepared business for one another—the smaller for the larger—general assemblies of the people are mentioned, which may have had very limited powers, perhaps no right to originate measures. In some oligarchies, again, a class of citizens, as the hoplites of the Malians (Aristot. cited above), form a senate without regard to number, but in so small a state these were without doubt few. In others a senate of permanent, and a council of annual members are found side by side. Such may have been the *eighty* and the *council* (βουλή), at Argos, who with magistrates

\* Plut., Q. Græc., 1., and for Cnidus, *ibid.*, 4.

† Of the constitution of this old Phocæan colony, Strabo thus speaks (iv., § 5, p. 179): "The Massaliots have an aristocratic administration, and are under the best of laws. They appoint a *synedrium* [or council] of six hundred, who hold this honor for life, and are called *timuchi* [honor or office holders]. Fifteen are presidents of the synedrium, to whom the management of current affairs is entrusted. Again, three persons of the greatest influence preside over the fifteen, and one presides over the three. No one can become a timuchus who is without children, and is not born of those who have been citizens for three generations." This does not imply that all who are thus descended can be timuchi, unless citizens is taken in the sense of citizens with full rights, and implies admissions of new comers into the community. Cæsar mentions the fifteen. (De Bell. Civ., i., § 35.)



called *Artynæ* (arrangers or managers) were to take the oaths in the treaty of 420 B.C. At Athens, while it was an oligarchy, the council sitting on the Areopagus and composed of members of well-born families (*eūpatridæ*), was the council for state affairs, as well as a court of justice; the nine archons, afterwards presidents of courts of justice, were the chiefs of administration; and a newer body of *naucrari*, or presidents of forty-eight districts, formed a council for military, naval, and financial affairs. All this probably belonged to the aristocratic constitution.

The executive officers and presiding magistrates of the Greek states, in the aristocratic ages, seem to have formed boards or colleges, selected from the magistrates in general, and having their special departments, but uniting in counsel. A body, for instance, called a *Synarchia*, or union of magistrates (a board met with in other cities), is mentioned as existing at Megara and as bringing their propositions before the *æsymnctæ*, the council and assembly of the people. The many names which are attached to the magistrates show the free development of political ideas in the little states of Greece. Prytanis was one of the oldest and most widely diffused through various races. The length of office in the præhistoric times may have been for life or for a term of years, ten, for instance, but the general tendency was towards a continually shorter term.

The magistrates or public officers in the oligarchies were taken from certain families which kept themselves distinct from the people by not intermarrying with them, or from a single family, as in the case of the Bacchiadæ at Corinth already mentioned, or from those who had a certain amount of property. In some cases a son succeeded his father in an office; a peculiarity which Aristotle thought to be important enough to define by it one of his kinds of oligarchy. (Pol., vi. or iv., 5, § 1.) Age, also, among those who were eligible, was naturally an aristocratic requisite. Thus, in Chalcis of Eubœa, the age of fifty was the lowest limit. The magistrates were responsible almost without exception; they,

probably, as a general rule, served without salary, and hence Aristotle advises (Pol., vii. or vi., 4, § 6), that the principal magistrates in an oligarchy should have expensive public services (*liturgiæ*) imposed on them, so that the people should willingly be excluded from these offices, and should not be jealous of the holders of them, inasmuch as they had paid high for their privilege. It would be well, also, he thinks, that when they enter on their magistracies they should make sacrificial feasts and build some public monument, for thus the people, partaking of the festivities and seeing the city adorned with statues and buildings, would desire the permanence of the constitution. But this, he adds, "the oligarchs of the present day do not do, but rather the contrary. They seek gains no less than honors, for which reason it is just to call the oligarchies democracies in the hands of a few."

The administration of justice in the aristocratic city-states of Greece differed from those of the democracies chiefly in these particulars: that civil cases were decided by magistrates without a court of judges or dicasts, and that criminal justice, as far as crimes were concerned, was in the hands of colleges of public officers. Murder and other crimes having a religious side, were brought before special courts. Aristotle remarks on the impolicy of so organizing the courts of justice that those who are not full citizens could serve in them, "for by demagogy in reference to trials they [the members of the aristocracy, when accused of crimes] change the constitution, as happened in Heraclea of Pontus." (viii. or v., 5, § 5.)

The Greeks of the little oligarchies strove with great good sense to preserve the existing state of things by institutions, especially by an education of the young, suited for this end. But it was impossible, whenever intelligence and wealth came in among the people, to preserve these governments from feeling the natural causes of decay, such as the feeling of inferiority in those who were excluded, of bitter hatred towards the haughty eupatrids, of decay in the number and physical constitution of families marrying within themselves. A time of decay came to all of them. Aristotle mentions the dangers

and the means of averting them. (Pol., viii. or v., 5.) The causes of revolutions in oligarchies—so far as they are peculiar—may be reduced, he thinks, to two, the first of which is oppression of the inferior classes, who will take any leader that offers. It more frequently happens, however, that the authors of the movements belong to the members of the oligarchy itself. “Such was Lygdamis in Naxos, who afterwards became a tyrant over the people of the island.” There are differences in the revolutions that arise from some discontent within the oligarchical body. “Sometimes they arise from the fact that numbers in the wealthy class are not admitted to a share in the offices, which are kept in the hands of a few. Such was the case in Marseilles, in Istrus (or Istropolis), in Heraclea (of Pontus ?), where those who did not share in office agitated until they got a share for fathers and older brothers, first, and then for younger. It was, indeed, against the law in some states for children to hold office at the same time with their fathers, and for brothers at the same time with brothers.”\* At Marseilles the oligarchy became [through the change] more republican [more like the *politeia* or commonwealth] ; in Istrus it ended in a democracy ; in Heraclea, from consisting of a few, it came into the hands of six hundred. In Cnidus again, where the *notables* quarrelled among themselves, because, as in the case just mentioned, more than one in a family could not hold office at once, the people, seizing the opportunity while they were in their strife, with the aid of a leader from among the *notables*, attacked and overcame them. Again in Erythræ, during the oligarchy of the Basilidæ in the old times, although those who were holding the government administered affairs well, the people, indignant at being governed by a few, changed the form of polity. Oligarchies, again, are shaken through the rivalry of demagogues arising within the number of the holders of power themselves. There are two kinds of demagogy ; one, the sphere of which is within the oligarchy, for a demagogue

\* Comp. the *divieto* in Florence, *infra*, § 186.

can arise in a ruling faction, of however few it may consist, as among the thirty at Athens Charicles gained his ascendancy by being a demagogue among the thirty [B. C. 404], and Phrynichus likewise among the four hundred. [B. C. 411.] Again, those are oligarchic demagogues who flatter the people, as at Larissa the magistrates, called *politophylaces*, because the people chose them, played the demagogue towards the people. The same is true of oligarchies where the class from which the public officers are selected do not choose the officers, but while large properties or select clubs furnish the officers, the heavy armed soldiers or the demus chose them, as in Abydus. So where the courts of justice are not filled by the more privileged class of citizens, the polity is changed by demagogical arts used in reference to trials. There are changes again when the power is restricted to a small number, in which case those who claim equality are forced to call the people to their aid. Changes occur, also, where members of the oligarchy by riotous living waste their own property ; for such persons are ready for innovations in the polity, and either themselves try to gain tyrannical power or put others up to the gaining of it, as Hipparinus put Dionysius [the elder] forward. (Pol., viii. or v., 5, §§ 1-6). Sometimes they [*i. e.*, these ruined members of the oligarchy] try to make some political change, sometimes to steal the public treasure, from which dissensions arise among the thieves ; or else those who rise up in arms against the thieves effect a revolution. A harmonious oligarchy, however, is not easily destroyed by itself, as the polity of the Pharsalians proves, for they, though few, are masters of many because they treat one another well. Oligarchies are destroyed again when a second rises up within a first. This takes place when all the politically qualified being but a few, all of those few are not admitted to a participation in the principal offices. Elis affords an instance of this, where the holders of power being, at the most, a small body, the numbers of new senators was necessarily very inconsiderable, because the senators, being in all ninety, held office for life ; more-



over, the choice was confined to a few powerful families. (§§ 7, 8.)

Oligarchies, Aristotle adds, are exposed to revolutions both in war and in peace. "In war, owing to distrust of the people, they are forced to employ [hired] soldiers whose commander often becomes a tyrant, as Timophanes [brother of Timoleon] did at Corinth. Or if there are a number of commanders they acquire dynastic power for themselves. But sometimes in apprehension of this they [the oligarchy] give the people a share in the government, because they are forced to make use of their assistance. Sometimes, again, in peace, on account of mutual distrust, they put the guard of the city into the hands of soldiers and a commander who belongs to neither party, who sometimes becomes master of both, as happened at Larissa under the government of the Aleuadæ, namely, of Simus and his party,\* and at Abydus in the times of the clubs, one of which was that of Iphiades." (§ 9.)

Factions and strife arise also when members of the governing class, in an oligarchy, work against one another and form counter factions on the score of marriages or suits at law. Such were the factions already spoken of relating to marriage; and Diagoras of Eretria, owing to a wrong in this respect, overthrew the oligarchy of the horsemen in that city. From the verdict of a court the civil strife in Heraclea arose, and an accusation of adultery occasioned one at Thebes. The punishment was procured justly but in a factious way against Eurytion in Heraclea, and against Archias in Thebes. Their adversaries had such violent feelings toward them as to cause them to be fastened in the pillory in the agora. † (§ 10.)

Many oligarchies again have been overthrown by members of the ruling class itself who had been disaffected on account

\* The reading τῶν περὶ Σίμων, instead of τῶν περὶ Σάμων, from which no sense can be elicited, is adopted in Didot's Aristotle, after Schneider, who makes it very probable in the addenda to the second volume of his edition of the Politics.

† A punishment inflicted on slaves more especially. Comp. K. F. Hermann, Gr. Antiq., iii., § 72, note 33.

of the despotism of the government. This happened to the oligarchies in Cnidus and in Chios. Changes of polity are caused also both in an oligarchy and in a commonwealth (politeia) by chance or change of circumstances, in those states where the offices of senator, judge and magistrate depend on a fixed amount of property; for in many places the original amount or property qualification had been fixed upon with reference to the circumstances of the time—so that in an oligarchy the few, and in a commonwealth the middle class, could have a share in the government. But at length, owing to the prosperity caused by peace or by some other source of good fortune, the properties became worth many times their old price, whether by some sudden enhancement or in a gradual unperceived way, and thus all the citizens could partake of all offices in the state. Revolutions and internal strifes arise in oligarchies from such causes. It may be added in the general way that both democracies and oligarchies sometimes pass over not into the opposite polities, but into those within the same species, as from legal democracies and oligarchies into arbitrary ones and from these into those. (§ 11, 12.)

Aristotle proceeds to consider revolutions in *aristocracies* (viii. or v., 6); on which we need not dwell, since substantially the same influences, only with a less destructive energy, are at work here as in *oligarchies*. Revolutions arise here from the smallness of the minority who have access to public affairs, so as to exclude a part of the citizens, who are in most respects their equals; from the outraged feelings of eminent men who are put below others, their inferiors in everything but aristocratic rank; from the extremes of opulence and misery to be found in states of this kind; from a single all-grasping man like Pausanias of Sparta; from allowing the principal persons in the state to accumulate too large properties; from unperceived and insensible causes.

The Greek oligarchies and aristocracies were in a situation, owing to the small size of the city-states, to feel influences from neighboring states of an opposite constitution with

great sensitiveness; and as parties, within the state leaning towards democracy or oligarchy, were brought into close contact within the same city-walls and subject to suspicion, and irritations caused by single persons, it is not strange that parties were bitter and cruel. Such bitterness and cruelty is well illustrated by the seditions in Corcyra during the Peloponnesian war, ending in the frightful massacre (427 B. C.) in which the oligarchy were nearly all cut off; and by the temporary sway and reign of terror at Athens during the ascendancy of the thirty towards the close of the same contest. Still more strikingly is the bitterness of parties shown by what Aristotle records of oaths taken in some oligarchies in his time to this effect: "I will ever have a hostile mind towards the demus and devise whatever evil I can against it." (viii., or v. 7, § 19). Such horrible expressions of hatred are not strange in a small community, where suspicions of internal violence and of intrigues with other states are continually aroused, nor are they peculiar to the Greeks. The Italian republics of the middle ages furnish parallels in more respects than one to the Greek city-states, in which parties were about equally strong, and where an active democracy was contending for a share in the government without *success*.

### § 179.

After the expulsion of the Tarquins at Rome, an aristocratical rather than an oligarchical form of  
Rome in its form of aristocracy. polity was given to the state by those who were in the possession of wealth and power. The great change was the substitution of two annually elected magistrates instead of the ancient king elected for life. The new chief magistrates had very great power, they were all but kings for a year; but the singular principle of collegiality, almost peculiar to Rome, by which two or more persons had at the same time the same power, left it free for them to divide their functions or to oppose and interfere with one another. So far it was a limitation, but we cannot say whether these



prætors or consuls were by original creation two in number in order that they might check one another, which is imputing perhaps too much sagacity to those who planned the office, or whether there were two rather than one, in order that one might be in service abroad if necessary, while the other was a magistrate at home, like the king and the prefect of the city ; or whether some ancient peculiarity of the city-state gave form to the institution.

The free inhabitants at the expulsion of the kings, constituted, besides protected strangers, two classes, one with rights of suffrage and of holding office and from which alone the active or debating members of the senate were taken, and another of citizens without *jus suffragii*, or, at least, without *jus honorum*, *i. e.*, the plebeian order. These latter had been united with the first in what is called the Servian constitution, which, in its system of centuries and classes, had reference at first simply to service in war. A rule excluding persons over sixty years of age from the centuries would have been absurd, as Mommsen observes, had it affected political rights.\* Many of the first citizens of the state and the members of the senate must have outlived that number of years. But on lists of men liable to be called into the field, and to appear according to the estimate of their estates, in different armor and different kinds of military service, such men would naturally have no place. Even such citizens as had reached the age of forty-six were excused from service in the field, and only guarded the walls. But this constitution, although it aimed simply at systematizing military affairs, brought important political consequences with it. It brought the wealthy plebeian and the patrician into the field side by side, or put some plebeians, it might be, into the rank of heavy armed troops, while some patricians were in an inferior class. The centuries sanctioned the testaments of soldiers made before battle, and of them the king asked sanction in aggressive wars. (Momms., i., 138-139, transl.) And as

\* Mommsen, Hist., i., 138, Amer. ed. of transl.

under the kings plebeians had been received on the proposal of the king, by consent of the patrician *curiæ*, into their number, it might naturally be an object of hope that the same thing should take place after the Servian constitution, and after the expulsion.\*

The consuls had nearly the power of kings and stood as heads of the aristocracy; which naturally would become and seems to have become more jealous of its privileges and to have acted more on the defensive against the order below them, as their common subjection to the king ceased; as well as more conscious of power to resist an annually elected magistrate than one appointed for life. The great points to be reached by the plebeians were restriction of the power of the consuls, and abolition of the exclusive right of patricians to the offices and control of the state. There was, of course, stout resistance in both of these particulars, and it fills the history of Rome for several centuries until they gained their points. On the whole, the internal contest was waged with more patience and less violence on the part of the popular leaders than is usual in similar struggles between orders. The absence of sedition and of extreme measures, where self-defence did not make them necessary, does high honor to the loyal spirit of the Romans; and the conflict must, in the course of the ages during which it was going on, have called forth an amount of political thought which was the best education for the citizen. At length, all patrician privileges were abrogated, the state from two became one, plebeians filled the highest offices of state, were at the head of armies, founded families that became illustrious. But now another division arose, between the *optimates* and the people or plebs, the former of which was composed of families of great wealth, most of whom had had consular members, or, at least, such as

\* It has not been an object in this sketch to give an account of the constitution of Rome, but only of the changes by which it passed out of its aristocratical form. Hence, nothing has been said of the dictatorship and little of other offices as such. The dictatorship had no marked influence on the development of the Roman constitution.

were qualified by their offices for admission into the senate ; and who sought to secure offices at home, proconsulships abroad, and other ways of getting honor and fortune. This party was represented by the senate ; it contained men of plebeian families like the Licinii to which Crassus belonged, as well as of patrician like the Fabii and Æmilii, who by their position, connections, and wealth were able, for the most part, to engross the honors and emoluments of the state. The senate thus composed became an oligarchical council, seeking principally the advantages of its members, and of their friends. On the other hand there grew up a new popular party, for which the tribunes of the people formed a natural head and on many occasions resisted the measures of the administrative organ with demagogical arts and violence. The division thus caused, was intensified when prominent men like Marius and Sulla, Cæsar and Pompey, in their own personal interest, and engaged in strife with one another, enlisted senate and people on the two sides. The later phases of these factions were low and disgraceful, and it seemed to be a necessary downfall when a member of a patrician family, which had never been very eminent in the state, sided with the people and overthrew the senate. This series of revolutions, so closed, consisted of monarchy of the old heroic sort, a rigid aristocracy, a commonwealth or republic containing an oligarchy, a tyranny in the form of imperial power, accepted by senate and people, and absorbing into itself the authority of the highest magistrates. These changes were in kind similar to those which many little Greek states had passed through before, but now they appear on a vast scale, in a state which had conquered the world.

In what follows we propose to confine ourselves simply to three points : to the senate as the organ of a class ; to changes in political rights by which the plebs became one with the aristocracy ; and to those changes which brought limitations into the power of the consuls, both by positive restrictions and by dividing up the functions of government among a number of magistrates.

I. The Senate of Rome, consisting, according to tradition,  
of the heads of the three hundred original gentes,

The Senate.

belonging in equal numbers to the three original tribes, was a body of life-long counsellors of the kings, not materially differing from those in the early Greek monarchies of which we have already spoken. At the beginning of the republic, according to a tradition accepted by all the ancient writers who have spoken on this subject, an addition of as many as one hundred and four members was made to the senate on account of the reduction of its numbers at the revolution, and these were taken from the plebeian order. The new members were called *conscripti*; and *patres conscripti* came to mean the same as if it were *qui patres, quique conscripti*, which for shortness' sake became *patres conscripti*. The smallness of the number of patrician members then existing is accounted for by the violence of the last Tarquin, which spent itself chiefly on his principal foes. Thus much is historical—that there were plebeian senators like P. Licinius Calvus, the first military tribune with consular power taken from the *plebs* (Livy, v., 12); and it is probable that numbers of wealthy members of that order were at the time mentioned brought into the patrician council in order to add strength to that body. But when the consuls appointed the senators, as the kings did before them, and when the patrician feeling became more intense after the power of the kings was taken away, it is probable that the number of these plebeian members diminished with the course of time. It was good policy to choose into the senate a few such men, whose interests on the whole coincided with those of the ruling order, and who were thus in a degree separated from the humbler plebeians. The tradition makes the plebeian senators to have been excluded from debate; they gave no opinion, but on a division went to the side or quarter which they preferred. When the consulship was open to plebeians, as the chief magistrates were asked their opinion before the rest, such degradation must ere long have ceased.

The consuls, and afterwards the censors, determined who



should belong to the senate, until the Ovinian law—of uncertain date but enacted not very long after the consulship was opened to plebeians—“conferred a seat and a vote in the senate provisionally on every one who had been curule edile, prætor or consul, and bound the next censors either formally to inscribe these expectants upon the senatorial roll, or, at any rate, to exclude them from the roll only for such reasons as sufficed for the rejection of an actual senator.”\* The officers who made the lists of senators had in general the power of *calling in* persons who had filled no curule office, when the number of three hundred was not reached by those who had filled a magistracy from the quaestorship upward; and the censors at least *could thrust out*, for reasons alleged, such persons as were by them judged unworthy of a seat, on account of some moral or other stain on their character. With this exception the senators held their office for life as before. The tribunes, be it here remarked, were not as such originally members of the senate, but acquired the right of taking their seats in front of the *curia*, where they could examine, and, if they pleased, object to a decree of that body. Afterwards by the plebiscitum Atinium (634 U. C., =130 B. C.) entrance into the senate was conceded to them, and they retained their senatorial rank even when Sulla had taken away some of their important powers. In the last century of the republic the senate considerably exceeded three hundred. At least we find that Cicero, on one occasion, mentions 415 and on another 417 as being present, while a number must have been absent in their provincial offices or for other reasons.

The functions of this body, composed of men already

\* Mommsen, Rom. Hist., i., 408 (book ii., chap. 3), of the transl. But it is not clear what was the meaning of this law. For the subject comp. Mommsen's Rom. Staatsr., ii., pt. i., p. 394, onw., and Lange, Röm. Alt., ii., § 111. Lange thinks that the constitutional number of 300 senators was reached in consequence of the Ovinian law only at the time of the *lectio senatus*, but would become incomplete by the deaths of senators during a lustrum.

versed in public affairs, and gathering together more political experience than any other assembly of public men under any form of government whatsoever, were not those of law-makers, but of a council of administration. With the consular or republican constitution the importance of the senate increased, and a still greater increase of its importance was due to the growth of the territory and revenues, and the vast amount of the internal and external affairs of Rome requiring attention. The senate was in truth the governing institution at Rome, and it gave unity, system, strength, to the state, more than anything else.

The principal functions of the senate, when it had reached its full efficiency, or from the second Punic war onward, were the following: (1.) It had a general superintendence over the state religion. Thus in 327 U. C., the ædiles were directed to see to it that none but Roman gods should be worshipped, and they only after the ancestral manner. (Liv., iv., 30.) In 568 U. C., the *Senatus consultum de Bacchanalibus*, which is still extant, was made in order to prevent the spread of the immoral and politically dangerous orgies of Bacchus, which had recently got a foothold in Italy, and even in the city of Rome itself. (Livy, xxxix. 8-18.) (2.) Foreign affairs fell to a great extent within the province of the senate, and its principal business was of this description. In regard to the declaration of war, however, it had no absolute and final decision. Even under the kings the *populus* was consulted as to whether a war should be undertaken; and therefore, when, in the year of the city 327, according to Livy's account (iv., 30), there was a controversy whether war should be declared by the people or whether a resolution of the senate was sufficient, we must probably regard the war as a continuation of an earlier one, which truce had only interrupted. Such conflicts might naturally arise without an assumption on the part of the senate, from the indefiniteness of administrative power; or a provincial governor might provoke a war for which immediate measures of the state might be necessary. War being declared or already on foot, the senate decided on the

raising of levies at home and the contingent to be furnished by the allies, made the general arrangements for expeditions, or sometimes put a skilful commander out of order in the place of one who had drawn a province by lot, one consul, for instance, or one consular man in the place of another. In short, there was no operation of war over which it had not the ultimate control. For making treaties of peace a magistrate with imperium, as a commander of a province, had the competence. But it became the usage generally not to exercise this high authority, but rather to refer those who sued for peace to the senate. And the senate still retained its part in making treaties of peace after it came to be regarded as constitutional that a treaty of any kind was invalid without the consent of the Roman community. (Lange, ii., § 117, p. 376, ed. 1.) In order to do its appropriate work of arranging terms and all details, which were to be laid before the people, the senate was wont to send legates, usually ten in number, to a distant province, for the purpose of acting with the commanders in the field. From these principal acts of administration it naturally came about that the senate had all diplomatic business in its hand; it heard foreign ambassadors; kings even appeared in the curia to transact business or make requests there. The senate, again, performed acts of almost sovereign power towards the subjected states or peoples, decided as to the condition of such as had submitted themselves in war to the Roman state, perhaps in connection with the joint action of the people in making treaties. The details, also, of provincial government passed under its review, or were subject to its control. Thus the appeals of the provincials against an oppressive governor were presented to this body for its decision, and trials, as in suits *rerum repetundarum*, could be instituted by its advice.

(3.) The senate had supervision over public property and the finances. The care of the treasury, the control of all receipts and expenses, Polybius justly regards as its principal duty. The quæstors, he says, can deliver no money over without resolutions of the senate giving them the authority,



except those sums which are paid over to the consuls ;\* “ and its permission is required by the censors when, in each lustrum, they build or repair public buildings, which call for by far the most important and considerable outlays.” (Polyb., vi., 13.) The consuls in the field, and dictators also, depended on the senate for their supplies. The public land was under their control, so that they could send out colonies and assign plots of ground to settlers. They granted money for public shows, and for the purchase of grain to be distributed among the people, gave presents to foreign ambassadors, and a dowry to the daughters of men who had deserved well of the public. They could even remit tribute imposed in the provinces or in Rome,† or required them to be paid after they had been remitted. “ Such gifts the senate always made with the reservation,” says Appian (Iber., § 44), “ that they should be valid as long as should seem good to the senate and the people.”

(4.) In a certain sense the senate had a share in legislation, not as a properly legislative body, but by the weight of their authority and influence over the proposers of laws, who were willing to follow the advice of the body to which they belonged, or who dreaded the senate’s opposition. But, besides this, *senatus consulta*, without the sanction of the people, in a number of cases acquired the force of laws. Such was the case in the provinces, when the laws might be regarded as a part of the administration in the given case ; and at Rome a decree which was intended to bind a magistrate in a particular instance, and which properly was binding on him only when he consented to obey it, and for his year of office, might be found by the succeeding magistrates a convenient guide for their practice, and might thus grow into a custom. This influence over legislation was not confined to the department of administration, but extended itself into both civil and criminal law. (Lange, u. s., p. 380.) Hence, under the empire it could be said that “ a *senatus consultum* had the force of

\* Present in Rome, Lange, u. s., p. 377.

† Lange, p. 378.

law, although that had been questioned." (Gaius, i., 4.) A power was exercised by the senate also of giving interpretations of the laws by their decrees. Thus a *senatus consultum* was made, on motion, of Cicero, as we should say, determining certain actions to be violations of the Calpurnian law concerning *ambitus*, passed in 687 U. C.=67 B. C. It would seem that the influence of the senate on legislation extended and widened in the latter years of the republic, and was still more important in the early empire, as the legislative capacity of the people died out.

(5.) The senate, without having any proper jurisdiction, in some cases aided the magistrates in administering justice, especially in some public crimes, such as those of poisoning and murder, when, on account of their epidemic nature, they disturbed the quiet of Italy. But this may be reduced, perhaps, to the head of extraordinary legislation made in some crisis, calling for summary measures for the public safety. Such was the resolution, the *senatus consultum ultimum*, as it has been named, by which the consuls were called upon to see that the republic received no detriment, or that the *imperium* and the majesty of the Roman people should be guarded. This decree, which gave the consuls dictatorial powers, had no formal justification to urge for itself; and the consuls, in exercising the power of life and death without a judicial trial in the case of citizens on the strength of this decree, would act illegally; but its obvious plea was extreme necessity.

We have elsewhere characterized the Roman senate as the organ first of an aristocracy composed of patricians who monopolized offices constitutionally, and then of an upper class approaching to an oligarchy, yet not an oligarchy in the worst sense. No oligarchy, if that name best describes the ruling order in the last ages of the republic, ever had so able an administrative council. When we consider what a number of men were there assembled, who, as prætors or consuls, had become familiar with the laws of their country, had served in foreign campaigns at the head of great armies, and were familiar with the military and financial strength of the

nations as far as to the remote east and west, or who had, as censors, a practical acquaintance with the pecuniary resources of Rome and the way of managing them; and when we consider also that these men must, many of them, have been in the senate for thirty or five-and-thirty years, we shall hardly hesitate to regard this as the ablest and best constituted of the councils which are recorded in the history of political institutions. And yet this perished and destroyed the republic by its short-sightedness, its selfishness, and the other vices to which a close aristocracy is subject.

### § 180.

At first, as we have seen, the plebs had no share with the patrician *gentes* in the political power of the state. There was not only no union of the orders, but the constitution prevented a union. There was no intermarriage, because patrician marriage was connected with religious rights of which plebeians could not partake; they could not fill the office of priests nor take auspices, and on this latter account could not perform consular duties. The religious lore, the knowledge of times and seasons, the rules governing the forms of civil processes, were patrician monopolies; and certain old usages required the assembly of the *gentes*—the *comitia curiata*, in which they had no part; they had no organs nor assemblies of their own like the patrician class. But they held land, they made contracts with patricians, they belonged to the military organization expressed in the *comitia centuriata*. That wealthy plebeians were incorporated into the senate at the beginning of the republic, has been already mentioned. As soldiers and holders of land, they could not, in the end, fail to acquire a right to political equality. But the aristocratic feeling now became even greater than before, and offered fierce opposition to their increase of rights at every step. Probably the wealthy plebeians, who, it seems, were chiefly the descendants of strangers, including freedmen, and not of clients, were for some time not greatly discontented with their position, and

2. Increase of the rights of the plebs.

had few political aspirations. They seem to have been quiet, unambitious citizens, as much afraid of the lower strata of their own order as they were desirous of a higher place in the state.

At an early day, after the banishment of the Tarquin family, the right of appeal was given to all citizens, and, according to tradition, by a member of the Valerian family, which ranked among the leading patrician gentes. Formerly, the king had decided a cause and had determined whether the person condemned should be allowed to appeal for pardon. The Valerian law of 245 A. U. C. = 509 B. C., ordered that the consul should allow capital sentences and those requiring corporal infliction to be brought by appeal before the *comitia* of the centuries. This was reckoned by the Romans one of the great safeguards of personal liberty, and the proposer of it was gratefully remembered.

But a much greater step in favor of plebeian rights was taken, when, after the first secession of the plebeian order, in 260 A. U. C., by a treaty between the senate and the leaders of the plebs, the choice of two tribunes, afterwards increased in number to five and then to ten, was provided for; who were to be elected from the plebeian order exclusively, to be sacrosanct in their persons, and to have the right of giving aid to individual plebeians oppressed by patrician magistrates, and of doing business with the people—the “*jus agendi cum plebe*.” For the purpose of choosing them, a new assembly, that of the tribes, was afterwards instituted, in which the tribunes presided, and which could pass decrees that were at first binding on plebeians alone, or *plebiscites*.\* As the

\* The question where the tribunes were elected before 282, is a much vexed one. Some, however, follow Cicero (*frag. orat.*, i., pro C. Cornelio), who says, “*itaque auspicato postero anno decem tribuni plebis comitiis curiatis creati sunt*,”—where the number of ten rests on another tradition than that which Livy follows. Dion. Hal., vi., 89, has the same tradition in regard to the composition of the body where the tribunes were chosen. “The *demus*, being distributed into the then existing *φράτραι*, or however one chooses to call them, which they now call *curiæ*, appointed as yearly magistrates the



person of the tribune was sacred, he or his helpers could rescue an arrested person out of the consul's hands, and thus protection was afforded to this order on the principle of one power in the state counteracting another. From this beginning, the tribunitian office grew in importance and efficiency until, although without imperium, it became equiponderant with that of consul; and the subsequent history of Rome turns very much on the contests in which tribunes are on one side principal actors. And this, too, was the case after the old distinctions as to the political rights of the two orders had become obliterated. The plebs had ere long, if enjoying the right of suffrage, two assemblies in which they could exercise it, the *comitia* of the centuries and that of the tribes. The patricians met with them in the first, on a common ground, and had their own assembly, that of the *curiæ*, besides. But this, in the course of years, became an unimportant, antiquated body, where no political rights were lodged, and only certain forms and usages required its existence.

The appointment of tribunes both parties seem to have regarded as involving the existence of two kinds of persons in the state; and it really perpetuated that political duality out of which it grew, more than any other measure in Roman history. The tribunes, when united, could hinder any measure, block the wheels of the senate, and procure the passage

following persons, etc." He then gives the names of *five*, and the sacral oath. So in ix., 41, he says that Publilius Volero (who is called Publius in the present text), got a law to be passed concerning the tribunitian elections, to transfer them from the *φρατριακή ψηφοφορία*, which the Romans call the *curiata*, to that of the tribes. So also x., 4. And Livy says, ii., 58 (282 A. U. C.), *tributis comitiis creati tribuni sunt*. Wachsmuth, Huschke, Mommsen (u. s., i., 361, trans.), accept this view, which in itself is extremely improbable. Schwegler, *Röm. Gesch.*, ii., 543 seq., L. Lange, *Röm. Alt.*, i., 440, ed. i., reject it as a historical blunder. Niebuhr, Walter, Arnold, *hist. of Rome*, i., 148, note 34, think that the *curiæ* confirmed the choice. See the references in Schwegler. Rein in Pauly's *Real-Encycl.*, vi., 2114, dissents from this. Bekker tries to show that the choice took place in the *comitia centuriata* (*Handb.*, ii., 2, 253-259), and Lange agrees with him.

of plebiscites, which by and by gained the force of laws binding on all citizens. But, as one could stay the proceedings of the rest, it was not difficult to cause disunion among them by influences of one kind or another. They appear in all the dissensions of Rome, and especially in the later times of the republican state, when they are found generally opposing the interests of the *optimates* and the senate—the tribune Octavius, who opposed his colleague C. Gracchus, being one of the exceptions—and they contributed more than any other magistrates to the downfall of the republic. With all this they did much good. The tribunate had its use, says Mommsen (u. s., i., 359), in pointing out legitimate paths of opposition, and averting many a wrong ; but it is equally evident that, where it did prove useful, it was employed for very different objects from those for which it had been established. “ The bold experiment of allowing the leaders of the opposition a constitutional veto, and of vesting them with a right to assert it regardless of consequences, proved to be an expedient by which the state was politically unhinged ; and social evils were prolonged by useless palliatives.” And again, “ this singular magistracy presented to the commons an obvious and available aid, and yet could not possibly carry out the necessary economic reforms [those relating to the bad taxation, the system of credit and the occupation of the domain-lands by the upper classes]. It was no proof of political wisdom, but a wretched compromise between the wealthy aristocracy and the leaderless multitude.” (u. s., i., 358.)

The years following the establishment of the tribunate were filled with violence, one of the worst instances of which was the murder of the tribune Genucius in 281 A. U. C., just before his impeachment of two ex-consuls was to be tried. This had, it would seem, the usual effect of political crimes—it benefited the other party ; for in 283 U. C., a law of Publilius Volero was proposed, and was carried, by which the plebeian assemblies of the tribes (the *comitia tributa*) were first introduced ; at the same time, it is probable that

plebiscites, if approved by the senate, were to have equal validity with laws passed in the *comitia centuriata*. (Momm-  
sen, i., 361.)

A few years later, in 292, one of the tribunes, with the object, it would seem, of lessening the consul's *imperium* in judicial matters, proposed a revision of the laws, so that a fixed form should be given to them and arbitrary judgments be prevented. After years of strife this project was carried, and the laws of the twelve tables were compiled. The aristocracy during the strife endeavored to pacify the minds of the opposite party by several concessions, namely, that the number of tribunes should be raised from five to ten (297 U. C.), so that two should be elected from each class ; that the part of the Aventine mount which had been public land, should be assigned to poorer plebeian citizens for building purposes (298 U. C.) ; and that the power of imposing fines, which had been without limits exercised by the consuls, should be restricted (300 U. C.) This was a great relief, as fixing a maximum of fines, as giving the power to all the magistrates of imposing them and thus disconnecting them with the consul's *imperium*, and probably as allowing appeal from the magistrates' decision.\*

The commission for making a code was not carried in the way in which the plebeians desired. They wished a share in the codification, but the other party would not consent, on the pretext that it was necessary to clothe the commission with the *imperium*, since alterations in the constitution could be brought to pass according to usage only by persons invested with that power ; while plebeians could have no *imperium* granted to them, both for political and for religious reasons. The commissioners for preparing the code, ten in number, were invested with consular *imperium*, and thus superseded the existing chief magistrates, although it is not made out that this regime was meant to be lasting. The decemvirs not having finished their work, a new set were ap-

\* See L. Lange, Röm. Alt., i., § 72.



pointed, among whom, besides a part of the old ones, some new men from the plebeian order appear. Within the board a plan of securing oligarchical power seems to have been cherished, and the leading decemvir allowed himself, according to the story, to commit great atrocities, which led the plebs to make another secession. By a combination of patriotic men of both parties, the decemviral power was overthrown, the old magistrates, including the consuls and tribunes, were restored, and the law proposed by the consuls Valerius and Horatius (the *lex Valeria Horatia*) not only repeated the old Valerian law, allowing appeal from a judicial sentence to death or stripes, but enacted also that *quod tributim populus jussisset populum teneret* (Livy, iii., 55), that laws passed in the *comitia tributa* should be binding on the patricians as well as on the other order. To these another law, repeating in substance the old Valerian law against tyrants, was added, that no magistrate from whose sentences there could be no appeal should be created; that any person who had procured the creation of such a magistrate might be killed without breach of law or of religious obligation; and that such killing should not be held to be a capital crime. (Livy, u. s.)

The law of the twelve tables contained very little of a political nature which had not been regarded as law before, and thus did not essentially change the relations of the orders. The contests, therefore, necessarily were renewed. In 309, U. C., the tribune Canuleius struck at one of the main causes of separation between the orders, by a law which made marriage legitimate between a patrician and a plebeian. In the same year a proposition was made that one of the consuls might be selected from a plebeian family. The first of these was aided, no doubt, by social good feeling between patricians and wealthy citizens of the other order. It is likely, also, that marriages had taken place between the orders, although the child of a plebeian mother followed her in her rank. Both propositions were opposed on religious prettexts. If the blood was mixed, the auspices would be impure. If, on the other hand, marriage were to be free without affecting

civil status, the child of a plebeian father or mother might be created consul without offence against religion. The social feeling respecting intermarriage, in which the rich plebeian alone could have had a great interest, enabled them to carry their point. The other must have soon followed, but for a proposal that met with success, that military tribunes with consular imperium should be the chief magistrates in the place of consuls. This may be regarded, perhaps, as a compromise between the parties, for members of either could fill this post of military tribune in the army. But—what shows that the concession was wrung from the patrician party—everything about this magistracy was left at loose ends; the senate was to make a decision every year whether the chief magistrates should be tribunes with consular power, or consuls. The former had this to recommend it, that the exigencies of war might require the presence of both consuls in the field, and the military tribunes—three, afterwards six in number, then six for each legion—had been officers of the army from the oldest time. Yet the grant of *imperium* to them, as they might be plebeians, was a giving up of the patrician point, as far as the non-military *imperium* was concerned. But they had no right of triumph, and in some other respects stood below the consuls in dignity.

The office of consular tribunes continued from 310 to 387, U. C., with some interruptions of years when consuls were appointed. Of these years two-and-twenty had consuls, and fifty-one military tribunes for the chief magistrates. The greater part of the time patricians won the elections, which seems to show that the poorer plebeians cared little about rewarding the wealthier men of their order with places; to them the disability was of little value.\*

Early in this period (prob. in 311, U. C., or in 319), the patricians managed, by separating from the consulship the function of holding the census, to constitute a new, very im-

\* Comp. L. Lange, i, § 76, Mommsen, Hist., i., 374, Staatsr. ii., i, § 165-175, for the consular tribunes.

portant power in the state, that of the censors. Livy ascribes its origin to the military duties of the consuls, which left them no leisure to hold the census, so that it had been neglected for many years. But he also adds that the proposition was welcomed in the senate "in order that there might be more patrician magistrates in the republic. (Liv., iv., § 8.) It had then, we may suppose, a motive for its existence in the patrician spirit, which is so much the more probable because the tribunes with consular power exceeded the consuls in number. The office was opened to plebeians after the Licinian plebiscite of 387, and probably as a consequence of this law without any other express legislation. With the growth of Rome it increased in importance and dignity. Besides the quinquennial census and lustrum, the financial affairs of Rome fell into the censors' hands, with a certain moral supervision over the community, the *lectio senatus*, and other business. For this office able and experienced men of years were usually selected, and the optimates, in the later Roman aristocracy, generally were the incumbents. In 403 U. C., both censorships were thrown open to plebeians, and shortly after it was made necessary that one censor should be of that order.

The Quæstors, first mentioned in 269 U. C., a little after the tribunate was instituted, may have been coeval in their origin with the consuls, with whom they were closely associated. In the year 333 U. C., their number, at first two, was enlarged to four, and at the same time the office was thrown open to plebeians, the first properly patrician magistracy on which that party relinquished its exclusive hold. (Livy iv., 43.)\* It was, perhaps, their supervision of the military chest and of the spoils which brought about this measure, soon after the consular tribunate, open to both orders, and with which the quæstors were closely joined in official service, was established.

\* For the quæstorship and its origin, see Momms., Röm. Staatsr., ii., under this title.

The consular tribunate was terminated in 387 U. C., by the Licinian laws, which indicate a combination between the wealthy plebeians and the poorer citizens of that order, especially the smaller farmers. After a number of years of strife and almost anarchy, in which the tribunes C. Licinius Stolo and L. Sextius Lateranensis led the opposition, the measures which they advocated were carried. They were the following: 1. That after deducting the paid interest from the amount owed by debtors, the remainder of a debt should be paid in three instalments. If it was intended by this law not to deduct all, but only the extra legal amount of the interest from the capital of the debt, this measure, as L. Lange remarks, loses its appearance of cutting down a debt (u. s., i., § 78, p. 492, ed. 1); otherwise it could be excused only on account of the bankruptcy of the debtors. 2. Another article provided “ne quis plus quingenta jugera agri possideret,” by which is probably to be understood that no one should occupy more than five hundred jugera of *public* land. In the same article or law there was this further provision, that no one should pasture on the public land more than one hundred head of large and five hundred of small cattle, and that a certain number of free laborers should be employed upon the land. (Appian, B. Civ., i., § 8.) 3. The third article was that no comitia for military tribunes should be held, and that one of the consuls should be a plebeian. As this was somewhat ambiguous, it was resolved in 411 U. C., that both consuls might be created from that order. As the question of eligibility to the principal office was now settled, it was easier to determine concerning the others. In 398 U. C., the dictatorship was filled by a plebeian; both censorships were open to them in 403, as we have before had occasion to mention; but until 474 that censor who was a patrician did not allow his colleague to perform the lustral sacrifices with which the census was closed. The power also, which the senate had before exercised at times, of pronouncing a law passed in the comitia of the centuries unconstitutional, was taken away

Licinian laws.—  
Consulate and other  
high offices opened.



from them in 415 U. C., by a law of the plebeian dictator Q. Publilius Philo; if that be the meaning of Livy's words (viii., 12), "ut legum quae comitiis centuriatis ferrentur ante initum suffragium patres auctores fierent," *i. e.*, that the senate should give its recommendation and sanction before the suffrages were cast, whatever the future law was to be, which would thus be a formal sanction, necessary simply on account of an old custom. The other laws of this same dictator, who, it is worth mentioning, acted in conjunction with a patrician colleague disaffected towards his own order, were that *plebiscita* should be binding on all citizens, and that whenever the law should allow both censors to be plebeians, one at least should be taken from that order. The first of these laws took away its political significance from the comitia of the curiæ, and from the senate its power of obstructing the legislation in the assembly of the whole people.

At the time of the Licinian laws an officer was appointed who bore the name of *prætor*, by which the consuls were designated at an early period, and who was intended to perform most of the judicial functions which had devolved on them, and perhaps on an assisting officer. The motive of the patricians in separating the judicial functions from the consulate may have been to keep at least this portion of the consul's duties in the possession of their order; but in 417 U. C., the same Publilius Philo of whom we have spoken was made the first plebeian prætor, much to the dissatisfaction of the patricians, but with no great opposition on their part. (Livy, viii., 15).

No civil office was now beyond the reach of the plebeians; for the dictatorship of C. Marcius Rutilus, the first dictator from that order in 398 U. C., eleven years after the passage of the Licinian-Sextian laws, was either sanctioned by some unknown law, or followed the precedent of the consulate without opposition. But all the public priests were still patricians, except the *duoviri* afterwards *decemviri, sacris faciundis*, who by a rogation of 387 U. C.—either the same which opened the consulate or another (Comp. Livy, vi., 37 and 42)—were

to be chosen in equal number from the two orders. This was the more easily carried, because the office of this college was to consult and report upon the Sibylline books and other oracles, since although their functions were very important as relating to the introduction of new religious rites, they had little connection with the old religious rites of Rome. The Ogulnian law, called after two tribunes bearing that name and passed in 454 U. C., required that four plebeian members should be added to the college of pontifices, and five to that of augurs, so that the first would consist of eight and the other of nine.\* (Livy, x., 7). These members, according to an old Roman usage, were added, it would seem, by coöptation; until, in 649 or 650 U. C., by a law of the tribune Domitius, a vote of a minority of the tribes, being convoked for the purpose, prescribed to the colleges whom they should associate with themselves by coöptation. (Comp. Cic. de l. agrar., ii., 7.)† Three or four colleges of priests and religious brethren remained in the exclusive possession of the patricians: these were the three greater flamines, the rex sacrorum, the Salii, and probably the fratres aruales, none of them of political importance.

The patricians, being skilled in the knowledge of forms legal and religious, kept the people dependent on them for information in this respect until the time of Appius Claudius the blind (450 U. C.), who is said by a Roman lawyer to have reduced the *legis actiones* to a form, and whose scribe surreptitiously disclosed them to the people; or, as Pliny says, obtained their favor by making known the days on which law business could be transacted. This knowledge had been confined to the pontifices, or at least was so little known, that the people had to learn what days were such by daily inquiries made to a few of the principal men. This event was nearly contemporary with the Ogulnian law, and may

\* Comp. Marquardt in Becker-Marquardt's Röm. Alterth., iv., 191, 347.

† Comp. Orelli's index legum, in his ed. of Cic. Op., viii., p. 172, and see Mommsen's Röm. Staatsr., ii., 1, 25, 26.



be regarded as a part of the same general attempt to take away monopolies from the patrician order. Had they retained within their order the knowledge of law, of the calendar, of religious festivals, of the sacred rites and books, their influence must have continued great, if not unassailable. The Licinian laws broke their power. The next sixty years complete the system of political equality in all important respects.

The victories which thus brought the two orders to an equality of rights, were waged principally for the benefit of the wealthy plebeians. Henceforth, until the fall of the republic, the possession of wealth and honors, which, to a great extent, the optimates contrived to keep in their hands, constituted an oligarchic party with no superior rights but of vast influence. The few new men, like Cicero, who won their way to honors and a place in the senate, were generally of this faction. Many of the old patrician names disappear from the fasti in process of time, the families being either extinct or reduced. Thus it is only the earlier annals that give us patrician consuls bearing the names Æbutius, Aternius, Curiatius, Foslius, Geganius, Genucius, Herminius, Horatius, Lartius, Menenius, Nautius, Numicius, Romilius, Tullius, Virginius, and others. The Fusii Camilli disappear with the grandson of the great Camillus, to reappear four centuries afterwards in 8 A. D. The Sergian *gens* is out of sight for centuries until Catiline makes it notorious. On the other hand, the Licinii, Domitii, Cæcili (Metelli), Marcii Philippi, Porcii, Octavii, to which the emperor Augustus belonged, Aurelii and others, were plebeian. The patrician *gentes* would have died out, probably to a greater extent still, if intermarriage between the orders had not been allowed, and the narrowness of a privileged clique would have undermined the respect the Romans felt for an ancient line. Thus the measures by which the exclusive patrician possession of office was taken from this order contributed to its preservation. The rich members of the plebs really helped the order which it stripped of its birthright.

A word or two will close what we have to say further of the optimates. Their ability to retain the senate in their hands enabled them to control the administration, as the senate was composed of past officers above the rank of quæstors. Their wealth helped them greatly to secure offices, and their offices to gain wealth. Two things are deserving of notice in this connection in the later age of the republic. One is the prevalence of *ambitus*, which no law was able to repress. The detailed account given by Lange in the third volume of his *Staatsalterthümer*, is most instructive, as showing the greatness of the evil and the difficulty of rooting it out. The other is the social decay of Rome. On the one side were the men of immense estates, the companies that farmed the taxes, the men of commerce who supplied Italy with grain ; on the other, the impoverishment of the poorer citizens, the admission into the army of persons with a lower census than before, or of such as had no property, who had the feelings of mercenaries rather than of citizens ; the buying out of small farmers and using the labor of slaves on lands once cultivated by freemen ; the crowds of paupers that found their way to Rome and needed to be helped to live by "frumentations." Such extremes naturally gave birth to parties in the state. The factions of Sulla and Marius fought for no important political question ; the captains stood at the head of great armies, and whichever conquered was likely to introduce irresponsible power. The new political arrangements of Sulla lasted but for a short time after his death, and had in themselves no element of stability. The subsequent struggles were even less political, except so far as an unwise, short-sighted senate endeavored to retain its hold on the administration. It evidently was incompetent to guide the republic. The head of an army was sure to be the master, if he had ability and sufficient force at once. Cæsar had this ability, while his adversaries showed weakness and disagreement. Thus the power fell to one man, although the ancient forms were retained as far as possible, and to a man who himself belonged to the class of the patricians and the optimates.

The old story repeated itself of an aristocracy overturned by its own disaffected members.

The history of Rome down to the empire is the most interesting chapter of politics that the world affords, with the exception, perhaps, of that of England. The steady growth of the plebeian party, the struggles carried on without civil war until Sulla's time, the advance of law while the polity was slowly changing, all rest on the good habits of the old populus, on the patria potestas, the punctilious religiousness, the morality, the dislike of change until it was inevitable; until wealth and conquest, want of faith, and a low populace destroyed the Roman character. Nowhere do we see a more evident connection between politics and the character of a community. Nowhere was the fall of a community so complete and so hopeless.

#### § 181.

Rome was a *political* state. Two remarkable states, one Government of Carthage. its rival Carthage, the other Venice, were commercial states; they were founded and grew up to promote industry. They both were aristocratic, and as specimens of that form of government deserving of study. We shall consider them next in order.

The early history of Carthage is but imperfectly known. The foundation of the city is referred by Josephus to about the year 870 B. C., and by Apion to the seventh Olympiad (c. Apion, i., 17, ii., 2), and is said to have been 287 years later than that of Utica. Carthage was a colony of Tyre, and at first a dependency, it is possible, of Utica. Its growth may have been accelerated by migrations from Phœnicia in cent. viii. B. C., and afterwards.\* In the time of Cambyses (525

\* "The flourishing of Carthage was accompanied by a parallel decline in the great cities of the Phœnician mother country, in Sidon and especially in Tyre; the prosperity of which was destroyed partly by internal commotions, partly by the pressure of external calamities, particularly by its sieges by Salmanassar in the first, Nebuchadonozor in the second, and Alexander in the fifth, century of Rome.

B. C.), it seems to have stood at the head of the Phœnician colonies in Africa, for the Persian king planned an expedition against it by name (Herodot., iii., 19), which was broken up by the refusal of the Phœnicians to make war on their children. About the same time Mago flourished, who, according to Justin (B. 19), laid the foundations of the Punic power, and was followed in his martial career by his sons and grandsons. A war with the natives now broke out, proceeding from a demand of theirs for payment of a ground rent on the soil of the city, which was ended by the payment of what had been long due. Some time afterwards the Africans were forced to return this money. Wars likewise were waged with Sardinia and the Greeks of Sicily, who sent to Sparta for help. At this time ambassadors came from Darius ordering the Carthaginians to refrain from sacrificing human victims, from eating dog's flesh, and from burying rather than burning their dead,—which, if the story is worthy of credit, seems to show that he looked upon the colonists of his subjects in Phœnicia as his subjects also. More important is what Justin goes on to say, that Carthage, disturbed by the great power of Mago's posterity, “chose a hundred judges from among the senators, whose business it should be to demand accounts from the military leaders on their return from their wars, and induce them so to make use of their military power as to respect judicial sentences and laws at home.” We may perhaps explain this as the fear of the aristocracy that one of the leading families would try to gain tyrannical power. We see in the narrative also that the native tribes were at one time powerful enough to fight with Carthage on equal terms, and, again, that the city had but recently begun its career of conquest and colonial settlement outside of Africa. Conquest did not enter into the purposes of the first settlers any more than into the objects of Venice or of the British East India Company

The noble families and the old firms of Tyre emigrated, for the most part, to the secure and flourishing daughter city.” (Mommson, *Hist. of Rome*, ii., 19, Amer. ed. of transl.)



at their origin. They were, however, naturally forced by the competitions of trade to come into collision with others who wished to break up their monopoly. This led to the wars, on the sea and on the land, of a state which was founded upon the industries of peace; a wider stretch of coast needed greater defences; to Sardinia and ports of Sicily Spain was added, as a province to be defended and monopolized; the commercial state was by this policy finally brought into conflict with a military state, and was conquered.

It is probable that the Phœnician colonies in Africa were never thoroughly incorporated in the Carthaginian empire; the relation which it held towards the more important of them seems to have been that of a *hegemony*, in which they had self-government with a certain subjection, the relation for instance, which the Bœotian states in Greece sustained towards Thebes.

The oldest account of the constitution of Carthage is to be found in Aristotle's Politics. We find here Aristotle on the constitution of Carthage. (as early as 322 B. C., when Aristotle died) the outlines of the same political forms to which the Roman and other writers allude; but whether any changes may have taken place between that date and the second Punic war (218-201 B. C.) it is impossible to determine.

Aristotle (Pol. ii., 8, §§ 1-9) regarded the polity of Carthage as a good one, superior in many points to that of other states and as in some respects bearing quite a resemblance to the polity of Sparta. It belonged, as he thought, to the class which included the Cretan institutions and those of Lacedæmon. A sign of its excellence was that, though it contained a democratic element, it remained true to its established forms, without factions and without a tyrant. In another place (viii., or v., 10, § 3) he refers to it as an example of a government passing from a tyranny into an aristocracy. Here (unless the reading ought to be Chalcedon instead of Carchedon), we can only guess that he has in mind the institution of the hundred judges to check the formidable



power of Mago's family.\* The first point of resemblance to the Sparta polity, which Aristotle mentions, is the common feasts of the political clubs (*ἐταιριῶν*) similar to the Spartan *phiditia*, of which nothing whatever is known; † the next is the board of the *hundred and four*, answering to the ephori of the Lacedæmonians, but which however is to be preferred to the ephori, inasmuch as the members are chosen according to merit, while the latter are taken from the ordinary citizens. The kings and senators are much alike in both states; but in Carthage, with greater wisdom, it is not required that they should belong to the same family, and they are elected to their office. The Carthaginian polity leans, he goes on to say, at one time more to the democratic, at another more to the oligarchic form; and Polybius remarks (vi., 51), that the people had already become, before the great war with the Romans, the chief power in the state. Its constitution resembled those of Rome and Sparta, but had already passed its acme. The question, What affairs should be brought before the people, it was the province, as Aristotle remarks, for the kings and the senate to decide; if they agreed, there was no need of referring the matter, but otherwise it went down to the people; and when thus submitted, the assembly was competent not only to hear and vote but to debate on the resolutions,—a power, says he, not conceded to them in the other polities (u. s., § 3). He speaks next of boards called *pentarchies*, as having most of the important affairs in their hands; as filling their own number by coöptation when there is a vacancy; as choosing the council of “the hundred,” and as holding their office longer than the other boards; but of all this we know nothing from

\* In ii., 8, § 1, he asserts that Carthage never had a tyrant. Comp. B. St. Hilaire's note in his transl. This seems to prove that Chalcædon, not Carthage, is referred to. The same is indicated by viii., or v., 10, § 4, where he calls it a democratic state.

† Livy, xxxiv., 69, speaks of a matter as the subject of common conversation “in circulis conviviisque,” but these words can have no political sense.

later authors.\* Another aristocratic characteristic of this polity is that the offices of government are without salary and not drawn by lot (§ 4), as well as that all cases at law are decided by the same magistrates, and not by judges of different orders.† In this polity the tendency appears towards selections for office according to a man's wealth as well as his merit. "This is a fault derived from the original fault of the legislator, who ought to have provided leisure for the citizens of greatest merit, and to have seen to it that poverty should never be disgraceful for private or public persons." Aristotle also blames that part of the polity which allows employments, even those of a king or of a general, to be purchased; since "it is absurd to suppose that, if a poor but worthy man will wish to enrich himself, a worse kind of man will not wish to pay for his expenses in buying an employment." He blames also the Carthaginians for allowing a person to hold more than one office at the same time, since one work is best done by one man. The dangers of the oligarchic polity at Carthage are avoided by sending out a part of the people into the colonies, and so giving them an opportunity to acquire riches. "But this," says he, "is a matter of chance. The lawgiver, by the polity itself, ought to prevent sedition. But now, if misfortune falls on the people and the lower class revolts against the magistrates, there is no medicine provided by the laws for securing quiet." (§§ 5-9.)

The most important organ of government at Carthage was the senate, from which probably the "hundred judges" ("ex numero senatorum," Justin, xix., 2) are to be distinguished, who were first created out of jealousy of the family of Mago, as has already been mentioned. I accede to the view of Heeren (*Ideen*, ii., 1, ch. 3), that this body is the same with the *gerusia*, which, in several passages, is to be distinguished from the senate properly so

\* Comp. Schneider's note ii., p. 145, and Barthélemy-St.-Hilaire, in his translation. Perhaps the "hundred" chose the pentarchies.

† This Aristotle repeats in iii., 1, 7.

called. Thus, with the army of Mago, commander at New Carthage (B. C. 209), there were two members of the former and fifteen of the latter,\* taken prisoners. (Polyb., x., 18.) Again, Livy, in mentioning that a deputation of thirty principal *seniores* was sent to the Romans to sue for peace, says, “id erat sanctius apud illos consilium, maximaque ad ipsum senatum regendum vis” (xxx., 16). Here a board is described which could send to Rome, in order to sue for peace, thirty of its principal members (triginta seniorum principes), and which controlled the senate itself. It is called a *consilium*, so that either the whole thirty composed the council, or it was a deputation from a council differing from the senate itself. Mommsen thinks these *seniores* to be the *gerusia*, composed of twenty-eight annually elected members and the two kings. It is doubtful, he says, whether along with this small council there existed a larger one, at any rate it was not of much importance. (Book iii., ch. i.) Such different results do modern scholars reach, when they fill out the scanty reports of the ancients.

We have then either two or three councils or boards, one created for a particular purpose and consisting of a hundred members, originally a detachment of a senate; that senate itself, and an inner, more private body, whose conclusions generally governed those of the senate itself. The institution of the “*judices*” and of the *gerusia* may have been subsequent to the existence of the senate, and shows the desire to control affairs by some authority on which the aristocracy could better rely. The judges were created to call the military officers, with perhaps the other magistrates and public servants, to account, and had criminal jurisdiction over them. The *gerusia* had the origination of drafts of laws, it is probable, and the principal voice in all administrative measures. As we have seen, when the senate and the chief magistrates were agreed in their policy, the people decided without debate.

\* Called *syncletus* or senate.

The name by which the chief magistrates were known was that of *suffetes* or *sufetes*, from the Semitic root *shaphat*, to judge, the participle of which, *Shophēt*, in the Hebrew scriptures, denotes those officers, ordinarily called judges, who were appointed, like the dictators of Rome and the *tagi* of Thessaly on extraordinary occasions especially when war was impending; and who both commanded in war and dispensed justice in peace for their lifetime. These *suffetes* are described as kings, and prætors; are compared with the Roman consuls (Livy, xxx., 7, 5), and are expressly asserted to be annual magistrates. (C. Nepos, Hannibal, § 7.) They had judicial power (Livy, xxxiv., 61), a seat probably in the council, some share in the administration, and were annually elected to their office from the principal families. They could unite with this office that of judge. They were conceived of by Aristotle as having greater authority than belongs to them in the subsequent history of Carthage. They were not peculiar to Carthage: we know that Gades had supreme magistrates with the same name, so that it is not improbable that the Phœnician colonies all had two men at the head of affairs, who were not called *kings*, like chief officers of state in the mother country, but *judges* to show their dependence on the home-government. Perhaps at first they were generals and judges alike. This is all that is known, or may be rationally conjectured, concerning the Carthaginian polity. Of the clubs and the pentarchies there is only the barest mention, as we have seen already. That offices could be purchased, as Aristotle tells us (u. s., ii., 8, § 6), is strange in an antique state, but not so strange in an aristocratic one; he can hardly intend only that the people were open to corrupting influences, that a wealthy man by spending money enough could secure to himself the election to the office of king or general.

Carthage and Venice (which we are next to consider) offer more analogies than any other two aristocratic states, but as we know much less of the ancient than of the modern commercial republic, its earlier condition must be neglected in the



comparison. The aristocratic qualities of Carthage are obvious from what has been said, and its place is among those republics, all whose institutions are intended for peace, but which betake themselves to war in order to secure commercial advantages. For the purposes of war they find it necessary to employ mercenary troops. Venice and Carthage were equally forced into this; Numidians and Iberians composed the armies of this republic, much as the soldiers gathered by condottieri composed those of Venice. Bomilcar made his mad attempt to become a tyrant in Carthage with the help of mercenaries in the time of Agathocles, and at the end of the peace of 241 B.C. (= 513 U. C.) with the Romans a most formidable war, threatening the very existence of Carthage, broke out against the hired troops and the Africans who made common cause with them. (Polyb., i., 65 onw.)

The democracy neither at Carthage nor at Venice had great strength or power of combination. Yet the principal leaders in the wars with Rome, the war party, had the people as their support, while the peace or oligarchic party was strong in the council of one hundred and the senate.

We may add that Aristotle seems to have estimated too highly the constitution of Carthage. But its faults, and the faults of a commercial aristocracy, such as it was, become apparent from the events of the century after that great philosopher's death.

Carthage, being a mercantile aristocracy, had the jealousies which rivals in trade call forth. The other Phenician colonies came under its control, or stood in the relation of allies whose friendship could not be trusted. Thus, Utica seems to have always been jealous or hostile toward the more powerful state, and Gades was willing to desert the Carthaginian cause by making peace with Rome. The foreign possessions of Carthage, besides those in Spain, and along the African coast, lay on the islands of Sardinia and Corsica; the Balearic islands came under its jurisdiction, and it long contended with the Greeks for the dominion of Sicily.



## THE CONSTITUTION OF VENICE.

## § 182.

Among all modern constitutions that of Venice offers us the most noticeable example of a close and jealous aristocracy; gaining its power by degrees, imposing checks on the government of the duke or doge lest he should found a line of hereditary princes or become a leader of a democracy; and reducing the people, in whose hands the original power of the state lay, to almost complete insignificance. This aristocracy was created by commerce, although it would appear that in early times a germ of old families was transplanted from the main land, during the invasions that then desolated Italy. It placed itself at the head of affairs and managed them with singular ability, and with a practical skill, such as might proceed from the counting-house and the experience of men acquainted with various lands. This is worthy of especial mention, that the policy of the state changed as that of a merchant would, whose sources of prosperity in one branch of his business were cut off. He puts his capital in another shape, tries new modes of traffic, places obstacles in the way of competitors, and bends all his energies to the recovery of his former success. The infant colony consisted of Italians, but the influences that told on it were, for the most part, not Italian. Within the jurisdiction of the exarch of Ravenna, under the eastern empire, secluded in position from the revolutions of Italy, these merchants, driving their trade on islands which served as walled fortresses against the continent, cared little for Lombards, Franks, or German emperors. In their religion they were more independent than any of the pope's Italian subjects. In trade they looked eastward towards Dalmatia, where they soon became predominant, towards various parts of the Levant, even towards Egypt and other Mohammedan states. When the crusades broke out they perceived the commercial advantages likely to

accrue to themselves, and were the principal carriers, as the Florentines were the principal money-lenders of the expeditions. When the Byzantine empire was disintegrated, and Constantinople was in Frank hands, they played a principal part and had the main advantage. Greece was open to them and in part became theirs, Candia was a dependency governed in the interest of the republic by men from its leading families. When, again, the Greeks recovered Constantinople, when a rival city took away much of the commerce on the Black Sea, and occupied the routes from the East, Venice found new avenues to wealth. And, especially, when the Turks moved westward, and threatened to overthrow their power in the Levant, they felt it necessary to adopt a new system. Territory must be secured on the main land, and thus they must mingle on a greater scale than before in the politics of Italy and of Europe. Thus Venice became at one time the leading state of Northern Italy. But the great kingdoms of Europe were too great for the small republic to stand by their side as an equal; the discovery of the passage round the Cape of Good Hope sent part of her trade into another channel; and while Spain, Holland, and England enlarged their intercourse with remote parts of the world; Venice fell off in her commerce, lost her power without losing her standing and prestige, until, in 1797, the grand council gave up her independence, and she became a part of the Austrian empire.

The leading steps in the political course of Venice were these: *First*, the infant settlements appear as  
Early Venice. part of the exarchate, and the inhabitants live chiefly on the islands which form the lagoons of Venice, Torcello, Malamocco, Chioggia, or further northward in Equilium, Caprolæ (Caorle), Heraclea, and Olivola. These places, with the exception of Heraclea, were, for a time, at least, episcopal sees under the jurisdiction of the archbishop of Grado,\* an island lying off Aquileia, where, after the schism

\* Comp. Wiltsh, Kirchl. Geogr., i., 179, ii., 169. In the second passage no bishopric of Malamocco is spoken of.

in the seventh century, a rival of the patriarch of Aquileia had his seat. The first was acknowledged by the Romans, the latter by the Lombards. The see of Grado was transferred to Venice in the fifteenth century; but long ere this the archbishop chiefly resided and was forced by the Venetians to reside at Rivoaltum or Rialto. This island, the present city of Venice, was not settled until after Torcello and other islands; but if the doge Agnellus Participatius (811-827) made it his residence, it must at that time have been somewhat thickly inhabited.

2. The first magistrates in the islands were *tribunes*, who, according to the gradations in military rank customary in Italy during the times just before the Lombard invasion, were under a *magister militum*. These tribunes seem to have been civil as well as military officers, and had no connection with one another. The *magister militum*, who was over them, depended on the exarch. The early relations, then, of these new settlements, were with the eastern empire; but the religious dissensions between the eastern and western churches, more especially the iconoclastic controversy, which broke out under Leo, the Isaurian (717-741), alienated them, as they did Rome, from the empire of Byzantium. The exarchs left them to themselves, such was the weak hold of the empire in Italy; and thus they freely developed their institutions, without, however, casting off their allegiance. Indeed, to have done this might have been highly injurious to the important commerce which they had begun to carry on with Istria, Dalmatia, and other parts of the eastern empire. In 697, not without the concurrence and advice of the archbishop of Grado, they chose their first duke, which seems to have been no act of revolt, since we hear of no hostilities growing out of it. It was intended, without doubt, as a help towards greater political unity, and was the effect, rather than the cause, of their substantial independence. As for the classes of persons who were thus united together, it is probable that, besides the original fishermen and the persons engaged in commerce, there were at an early date on the islands fami-

lies of a superior class from the main land. A Venetian chronicler declares that *magnates* and *proceres* from Aquileia settled in Rivolatum, of whom he gives a list amounting to fifty-three.\* Three dukes reigned from 697 to 737, of whom the third was killed in a tumult (or civil war, as the chronicler calls it), in whose place was elected, as an annual magistrate, a *magister militum*. The choice of a magistrate with this name was not strange, for, as Heinrich Leo (Gesch. Ital., i., 247) expresses himself, "in the regions of Ravenna and the Pentapolis *magistri militum* are spoken of as the highest political magistrates, and that, interchangeably with *duces*. Perhaps the choice of a new *dux* was hindered by the strife of factions only, and the *magister militum* in Venetia is put forward, no doubt, as the commander of the *scholæ militum*, or military companies, because the higher office was not yet filled." Officers with this title were at the head of affairs for five years, and then the son of the slain duke, who was elected to fill the same office, was blinded and banished.† It is recorded of the next duke but one, Dominicus Monegarius, that two *tribunes* were associated with him as counselors, in which we discern that suspicion of the doge which appears so prominently in later Venetian history.

From the year 811, for more than two centuries members of three families furnished Venice for the most part with its chief magistrates. This shows a certain tendency towards making this life-long office hereditary, or at least that the doges found it not difficult to secure the office during their life-time for one of their relatives. In the eighth century Venice carried on a commerce with the Saracens of Africa in Christian slaves, which Pope Zachary (732-751) forbade; and

\* Andrea Dandolo, doge in 1343, in Muratori, Rer. Ital. Scriptores, xii., 158.

† Dandolo (Mur., xii., 156) mentions that the town of Heraclea, from which the exiled dukes originated, was destroyed by the Venetians, although some, says he, ascribe the act to Pepin, king of France. Pepin was in Italy about 754, just before the duke Deusdedit or Diodato was deposed. May not the presence of the Franks in Italy have had something to do with these troubles?



the connection with Egypt is shown in the next century (827) by the transportation of the reliques of St. Mark from Alexandria. This was under the duke Agnellus Participatius, the same who made Rivoaltum the ducal residence. The seditions and violence against the dukes continued through the ninth and tenth centuries. Peter Candianus, who entered on his office in 942—the third duke of this family, one of the richest and most magnificent men of his time—is said to have endeavored to make the dukedom hereditary in his family. For this a faction attacked him in the palace, and when they could not get possession, set it on fire; it was consumed with other buildings, and the duke in attempting to escape was murdered. A document of this time mentions the loss of state-records, and thus throws suspicion on the exactness of Venetian history prior to this date.

Three dukes of the Urseoli family had reigned in succession from 991 to 1026, when the jealousy of the Venetians caused the banishment of Otto Urseolus and his brother, the archbishop of Grado. The family, however, was still powerful, and another member of it, Dominicus, tried to continue the family in the office. But an opposite party succeeded in choosing their candidate, many of the Urseoli were obliged to leave the state, and a law was passed that no duke should associate with himself another person as *condux*, *i. e.*, co-duke.\* This had been the means by which it had been possible to transmit the office to another member of the same family. Henceforth the duke's power was to be limited by means of two annually elected counsellors associated with him. From this time for more than four hundred years, in no instance, we believe, did the same family furnish two dukes to the republic in succession.

We may stop at this point where the doge begins to appear in his more modern form and the constitution is passing over, from one in which the people have a direct share, to one in

\* Dandolo (Mur. u. s.) says, his diebus reperitur statutum ut dux creandus consortem vel successorem non faciat, nec fieri permittat eo vivente.



which their assent begins to be nominal; something as it was in the election of bishops a few centuries after the Christian church was founded. We will consider first the constitution, as it related to the election of the doge, his power and the limitations placed upon it, then the great council and then the smaller councils of various kinds.

1. The doge. There can be little doubt, I think, that at the first all the people cast their vote for this officer, and that only afterward the great council began to exercise an important control over elections. The subsequent custom of calling the people together to announce to them the election, as well as the stormy scenes at the election of early doges, shows this. As late as when old Henry Dandolo was made doge (1192), and another manner of election was in use, the newly appointed council summoned the inhabitants of the territory from "*caput Aggeris*" (Cavarzere) to the island of Grado, *pro electione ducis solemniter celebrando*. The council being assembled after the usual fashion, forty electors were appointed by them, who, having chosen the doge on the first day of January, announced him to the people. Here all the people had to do was to hear the result of the election.

When the people ceased to have any effective voice, and when the council became in fact the electing body, I cannot ascertain. Domenicus Sylvus, or Sylvius, in 1071 was created duke, according to Andrea Dandolo, by all the people (*cuncto populo*); Domenico Michele is said by him to have been *created* and nothing further is added (1117). Pietro Polano (1180) is *appointed by the great council*. Sebastiano Ziani was *chosen* (1173) *by eleven sworn men* whose names, as given by Dandolo, show them to have belonged to well-known noble families. This doge had feeble health, and during his lifetime, the same chronicler tells us, a law was passed to the effect that four men should choose forty, by the majority of whom the next doge (who was Orio Mastropetro) should be elected. In 1229 the electors were divided into two equal parts, and the lot was used to decide between the

persons chosen by the parties. In 1249, to avoid this difficulty one was added, making the number one and forty.\* "As these forty-one electors, the councils and the people, were assembled for a new election, in 1249, the gastaldio Daniel swore with the assent of the people, and in their name, that they would accept the doge chosen in the way prescribed."† The forty-one continued as the electors of the doge for a long time, and Dandolo gives their names whenever a new doge is chosen.

In the year 1268, when Lorenzo Tiepolo was made doge, particular regulations for choosing the doge were adopted, which, with little change, continued always afterward. The members of the great council who were over thirty years old drew from a bag balls partly gilded and the rest plated. The thirty who drew the gilded balls, again cast the lot for nine of their number, whose business it was to be to appoint forty men of different families, seven of the nine voices being needed for a choice. These forty drew lots for twelve of their number, and these twelve chose twenty-five, of whom each needed to have nine votes for his election. The five and twenty cast lots for nine; the nine chose forty-five, each of whom needed seven voices for his election. This body of five and forty, after an oath to make a choice according to their consciences, threw the names of the persons whom they wished for doge into a vessel. If the votes were scattering, they repeated the process until twenty-five were given for one person, who was then declared elected. This was afterwards altered, and the names were balloted for, until a majority had agreed upon any one man. These successive attempts to eliminate all private agreements, and to get an impartial vote for a competent person by a combination of

\* Comp. F. Von Raumer's *Gesch. d. Hohenstauffen*, v. 336. The sketch of the Venetian constitution given by this eminent historian, and H. Leo's notices in several of the volumes of his *Gesch. Italiens*, have been of much use to me.

† Von Raumer, *u. s.* This fact is taken from the margin of the *Cod. Ambros.*, in Muratori, *u. s.*, xii., 377.

the lot and the ballot, show the jealousy which the members of the council entertained toward one another, especially toward the relatives of the deceased doge; but such complicated votes were not confined to the Venetian republic.\*

The doge's power was limited by the grand council, by his own special council, by the *quarantia*, afterwards by the power of the ten, and by special laws. Although chief magistrate, he could do very little on his own authority. He could not leave the republic without permission obtained from the two councils. He could appoint no relative of his own to a civil or ecclesiastical office. He could marry no foreign woman, lest the state might be brought into unpleasant foreign relations. He could give audience alone to no foreign ambassador, nor receive an ambasssy from foreign parts.† His executive power was rather a semblance than a reality *within* the limits of his official duties; for he was surrounded by so many councils created by the aristocracy, that little means of doing good or evil to the state were left to him.

2. The great council, especially after it became a close corporation, was the controlling body in the state, as representing first the community, then the wealth over against the people, then the upper aristocracy over against the new wealth. We have already spoken of the sources from which the aristocracy was derived. They were—to enumerate them more accurately—the families made rich in early times by navigation and commerce; the patrician families or town gentry who fled to Venice as a refuge in early times; the new-comers afterward, like the more than fifty magnates from the territory of Aquileia, and the nineteen

\* The account given by Dandolo differs from this in some particulars—he says nothing of gilded and plated balls, for instance—but is substantially the same.

† In Muratori's chronicle of A. Dandolo, a law is mentioned in regard to the doge's authority to receive ambassadors, passed under Rainerio Zeno, xii., 372.

Greeks, who, in the middle of the twelfth century \* were admitted into the grand council ; together with Venetians, or foreigners, occasionally, ennobled and made eligible to the highest privileges in the state in the course of time. Thus, when Rainerio Zeno was doge (1252-1268), ten *popularcs* obtained the right of sitting in the grand council on account of special services to the state. (Mur., xii., 372.) What the definition of nobility and aristocracy was at Venice in the earlier times, it is hard to say. The nobles had coats of arms, and many of them had filled important offices, or were descended from the principal men of the republic. But there seems to have been no exact line between them and the upper class of citizens until the "closing of the council," in 1297, after which to belong to families entitled to sit there was a patent of nobility.

There must have been a council with numerous members at Venice from early times, if we may argue from the analogy of most small republics. The first mention of such a council in the chronicle of Dandolo is where he speaks of events of the twelfth century. The grand council, as then constituted, was chosen by twelve persons, who themselves were selected by the people, one from each of the six districts where the community then resided. Each chose forty from his district, who sat for a year and began their sessions on the first of September, but could be re-elected. Afterwards, instead of twelve electors four seem to have had this duty assigned to them ; but now they were members of the council themselves, and held their office for years together. For some time, the council was open to any Venetian of standing sufficient to secure his election. The only limitation upon the free action of the electors was that none of them should choose into the council more than four of his kinsmen.

The century or century and a half which followed the capture of Constantinople (1205 onward), was as important a period for the development of the constitution of Venice as

\* When Domenico Mauroceno was doge (1148), A. Dandolo, (Mur., xii., 294.)



for the expansion of its power in the east. The events of this epoch seem to have increased the separation between the nobles and the people; as was natural when such new and copious sources of wealth and such knowledge of the world was open to the upper classes. In the dukedom of Peter Gradenigo (1289-1311) occurred the change in the constitution of the grand council, to which we have already referred, and which is known as "*il serrar del grande consiglio*." The object of this measure was to restrict admission into that body to a certain number of families, who thus would compose an aristocracy within an aristocracy. These privileged families were such as had supplied members to the council within four years. The names of the families were inscribed in the "*golden book*," and at that time or afterwards all members of such families, on reaching the age of twenty-five, had admission into it. Thus it was at last a close body, of the same kind substantially with the English house of lords, without being confined to the oldest sons of the nobles, and to a certain extent resembled the Roman senate, since a large part of its members must have had experience in public life through the busiest centuries of Venetian history.

The law of 1298 for the new constitution of the council is given as follows: "The forty (the *quarantia*) are to ballot as to all those who have been members of the great council within the last four years, and every one who receives at least twelve votes out of thirty will be a member for the next year. So also is the ballot to be taken in regard to the places of those who are in office or accidentally absent."

Further, "three men, nominated for this purpose, can propose persons as members of the council who have not sat there hitherto, and these have admission, provided twelve votes as above are cast for them. By this however it is not to be understood that those can be admitted into the great council, who by the usual resolutions are excluded from it."

To these acts may be annexed a part of a law proposed by the doge Gradenigo in 1297, through Leonardo Bembo and Marco Badoario, heads of the *quarantia*, and confirmed by the



council, that "in future no more elections are to be held, but that those who during the last four years were members of the council shall continue to be members of it, they and their children." This law was not to be abrogated unless five members of the signoria, twenty-five of the quarantia and two-thirds of the great council itself were against it.

The grand council was the proper deliberative and law-making assembly of the republic, but it had sundry appointments also in its hands. Mr. Rawdon Brown, who has searched the archives of Venice in quest of documents relating to English affairs, thus speaks of the efficiency of the great council at different times.\* "Throughout the whole of the republic the grand council continued to act, though with various degrees of power, and to register its proceedings. Overridden by the doge and his minor council in early times, it seems in the middle of the thirteenth century to have regained a portion of its influence, or at all events to have exercised a great amount of activity. We find that in 1255 it authorizes the doge, who probably was a sportsman, to grant permits for the exportation of hawks and hounds duty free. In April, 1281, it forbids surgeons to practice, until sworn before justices. In 1293, it prescribes the amusements of the citizens, prohibiting all games but chess and backgammon; and at the close of the following century, from 1393 to 1395, it regulates the paving and lighting of the town, and even interferes with the winding up of the parish clock at Rialto. But over-meddling is fatal to the influence of a numerous legislative assembly, and already, at the commencement of the fourteenth century, had its power passed over to the senate; nevertheless to the last the grand council exercised considerable patronage, and was in theory the sovereign body."

In the note extracted by Muratori (xii., 361) from the margin of a MS. of Dandolo's chronicle, the offices of the grand council are thus described. "They elected magistrates

\* Preface to his Calendar of State-papers and Manuscripts relating to English affairs, etc., pp. xii., xiii.

and were then called *consilium de electionibus*, they judged important cases, both civil and criminal, and they managed public affairs." This refers to the middle of the twelfth century.

There are statements which, if we can place reliance on them, show that before the law of 1297 passed by the grand council itself, the old constitution of the body had become obsolete, or changes had been made which are not recorded. Thus the received statement as to the number of 480, which the council could not surpass, is contradicted by another that in the years 1267, 1269, 1275, it consisted of 502, 501, 567 respectively. And instead of the limitation of members of any house or kindred to four; in 1261 eight Badoarii, eleven Falierii, fifteen Morosini, nineteen Dandoli, as many Quirini, twenty Contarini belonged to the council together, and the numbers vary in different years in the fourteenth century from 1047 (1311) to 897 (1350). It would seem also that long after the year when the law closing the council is said to have issued, elections into the council by ballot still went on. It is also remarkable that the law of 1297, closing the council, does not appear in the pretty complete collection of public decrees; and those who proposed it,—a Bambo and a Badoario,—did not belong to the *quarantia*, as is affirmed by the historians. These facts are fitted to excite suspicion respecting the law itself. Von Raumer, who cites for them two Venetian authorities, Sandi and Tentori, inclines to believe that no such laws were ever given, that the council was open after the time of their reputed enactment as before, that there was no such sudden conversion of the constitution into a close aristocracy, that the nobles did not at this time have an indiscriminate admission into the council, and that electors for admission into the council still continued. Nay, it is made probable that long before this critical time the electors, twelve or four or three, did not choose the whole council anew, but sometimes chose five and twenty, sometimes a hundred, and allowed the rest to remain in their places according to the needs of the time. Thus the

gradual steps towards a strict aristocracy cannot be distinctly traced, although the progress is certain.\*

3. The doge's council and the *pregadi*. We have seen, Doge's council and *pregadi*. that as early as the beginning of the eleventh century the doge was required to have two counsellors associated with him. These seem to have expanded into six counsellors chosen, at first, one from each district of the city, and afterwards appointed, if we are not deceived, by the grand council. These, with the three heads of the *quarantia*, added subsequently, formed the smaller council. To the doge and his six counsellors, the title of the *signoria* was given, the same which was bestowed on the governing body at Florence and elsewhere in Italy; and which shows that the doge was regarded as only the head of the board, which had the executive power in its hands.

At a subsequent period the smaller council, now ten in number, including the doge, was enlarged by the addition of six "*savi grandi*," who represented the senate or council of the *pregadi*, of six "*savi di terra firma*," who governed the provinces and in fact formed the home-department and war-office of the republic, and of six "*savi di ordini*" who managed the naval affairs and formed the board of admiralty.† To this board was given the same title of the *collegi* which belonged to certain associates of the *signori* at Florence; and that it was a unity in the eyes of the Venetians is shown by its title and the register of its transactions.

About the same time when the smaller council is first spoken of, mention is also made of the *pregadi*, or invited persons, whom the doge called together to assist him by their advice, and give him the weight of their influence. Originally few in number and with no official power, they were selected at first from the body of the citizens, then from the principal families, and early in the thirteenth century were chosen, sixty in number, by electors named by the grand council.‡

\* Von Raumer, u. s., v., 241-245.

† Mr. Rawdon Brown's Calendar, pref., p. xi.

‡ Comp. the *richesti* of Florence.

Afterwards their number was "fixed at three hundred, of whom one hundred and twenty were elected by the grand council; the rest had their seats by virtue of the offices they held in the state." \* Six of their number represented them in the collegio, the "savi grandi" of whom we have spoken. "Their importance seems to have increased as the affairs of Venice became more extensive and complicated, as is shown perhaps by their journals, part of which, in fourteen volumes, before 1331, having disappeared themselves, are known by indexes only, while from that time to the end of the republic they remain to show the efficiency of this instrument of the administration."

4. The *quarantia*, or board of forty, was at first invested with higher criminal jurisdiction, as well as with  
 The *quarantia*. appellate jurisdiction in civil and smaller criminal cases. Three heads or chief justices presided over it, who, as we have seen, formed a part of the doge's council and of the *collegio*. Among the criminal cases brought before this court would be some of a political character, and from this point its functions went on enlarging, until they included advisory powers of various kinds. Propositions coming from the *signoria* to the great council were submitted to this board for their deliberation and advice. They had a hand in executing and in modifying, if necessary, the law of 1296 relating to the great council. They have been compared with the areopagus of Athens.

5. The ten or council of ten. When Gradenigo was doge, and not long after the aristocratic closing of the  
 The ten. great council, a conspiracy of an alarming character was detected, in which Marino Bocconio and Bajamante Tiepolo were concerned, with a number of others, some of whom have the aristocratic names of Tiepoli, Badoarii, and Quirini. The record of this in Dandolo's chronicle is, that in 1308 a Tiepolo, with his accomplices, was banished, and that the council of *ten* was then instituted against these and others who

\* Mr. Rawdon Brown, u. s.



sought to disturb the state of the country. (Murat., u. s., under the year.) The ten were, at first, an extraordinary commission, appointed to sit for two months in order to ferret out this conspiracy, and full power was given to them both for the purpose of summoning witnesses before their tribunal, and of using means, such as they thought best, for eliciting the truth. As suspicion was aroused by the information brought before this court of secret police, its continuance was prolonged from one space of two months to another, until it began to be regarded as a necessary addition to the government. Then, it had a year's lease of life, until, in 1335, the great council—with the people, it is said—converted it into a standing institution by resolution and vote. This board of inquisitors, which the "holy office," then in full strength, may have suggested, has made more impression on the minds of readers of history than any other of the institutions of Venice. In 1335 the conspiracy of the doge, Marino Falieri, was brought to light by this board, and he was beheaded on the steps of the ducal palace. In 1432 Francesco Carmagnola, the ablest condottiere in Italy, and then at the head of the army of the republic, having aroused suspicion in regard to his fidelity, was invited to Venice on the pretext of asking his advice in respect to peace, and after a consultation with him until late in the night, was thrown into prison, tortured until he made the confessions desired, then led, with a gag in his mouth, to the piazza before the doge's palace, and beheaded—a terrible warning, whether he was guilty or not, to a class of men who would not scruple to overthrow or desert the governments that employed them.

The council of ten may be regarded as a police board and criminal court united, and was associated with the doge and his six councillors as a new council for special purposes. The members were chosen for a year, and could have no family connection whatever with the doge, nor could more than one belong to a single house. Its functions led it to control the executive officers, to detect conspiracies among the aristocracy, to look into every matter which might prove dangerous



to the state. There was no department with which it could not interfere. In the fifteenth century we find the ten, or this council and the "junta," \* corresponding with ambassadors and consuls, on matters of diplomacy, and in fact the diplomacy seems in the sixteenth century to be in their hands. Thus we find the vote in this council together with the junta for the affairs of Rome, that there be forthwith elected a nobleman to go to the king of England, instead of Ser. Hieronimo Guistiniano, who has refused. They fix his salary, and say that he need give no accounts to the signoria, and may keep, while in England, five servants and as many horses. They then elect the ambassador, and give him his instructions. Perhaps it was only in regard to secret envoys that they were entrusted with so high a power. (R. Brown, Calendar, i., p. 336.) But we find the collegio also holding communications with Venetian ambassadors (p. 340), and the senate with the doge doing the same thing (pp. 341, 343, 345, of the same work). A most singular concurrence of powers !

In 1539, whether because the council of ten had so much business on its hands or was not secret enough, a committee of three was elected from that body, known as the *three inquisitors* of state. With these the secret police and administration reached its height.

We may close our account of the constitution of Venice at this point, although we have to pass over in silence the administration of the provinces in the days when the power of the republic in the East was at its height, with other important points. What has been said is enough to show the indigenous character of the Venetian government, and its steady progress towards a rigorous aristocracy, in fact towards the extinction of real freedom. Here there was little influence from those causes which made mediæval Italy in other parts what it was ; there was no Frank power modifying an

\* In 1509 it is resolved that a junta of fifteen, "five at a time, as usual," be elected. "This junta is to attend to all matters concerning the pope and the Roman court." Rawdon Brown, Calendar, under that year.

older constitution, no feudalism and serfdom, little domination of the church. Everything grew out of commercial industry, out of the spirit of free adventure, yet nowhere in modern times has so close an aristocracy appeared. In deserting the principles of freedom and tolerable equality on which the foundations of the state were laid, the selfish magnates of Venice seem to show a clear comprehension of the dangers that threaten a commercial republic by admitting a roving and uncertain populace of sailors to a share in the government : but there was no calculation beforehand as to the methods to be used to secure the power of the aristocracy. Council after council appears, each taking part of the affairs of an older one, so that there was no neatness about the constitution, no accurate division of powers. Still the state of things at the time seems to have been apprehended with wonderful wisdom; and one cannot help thinking that more intelligence and practical sense was gathered here for centuries than anywhere else in Europe.

## CHAPTER V.

### CONSTITUTION OF FLORENCE.

#### § 183.

FLORENCE, a municipium of the later Roman republic or early empire, flourished as Faesulæ, three miles distant from it, declined, and it was the residence of magistrates of the province in the fourth century. Its destinies afterwards, under the Lombards and Franks, differed little from those of other cities of middle Italy. In the eleventh century, Beatrix, of Lorraine, governed Tuscany with her second husband, Godfrey, of lower Lorraine, and afterwards with her daughter Matilda, "the great countess." \* At the death of Matilda, by her will her land was to go to the pope; but the emperor, as her relative and feudal superior, refused to confirm her donation. It was found difficult to ascertain what was feudal, and what allodial property; and so Henry IV. seized on the whole. The Tuscan towns gained from this strife in regard to their independence; they seem to have been drawn to the pope by their common interest with him against the imperial head; and they were probably more on the papal side than they would have been, if, like very many Italian towns, they had fallen under episcopal jurisdiction.

In the time of Matilda, if not before, Florence became a commune, which implies a certain amount of self-government and internal union under officers of its own, with rights either granted by the good-will of the seignor, or purchased or usurped or possibly wrested from him. The count's jurisdiction disappears at Florence,

\* Comp., for this period, C. Hegel, prof. at Rostock, now at Erlangen, *Städteverfass. v. Ital.*, ii., 44, 198, 206.

and there remain the officers chosen by the town under the acknowledged supremacy of the emperors. This supremacy was *in theory always admitted* at Florence until the empire expired; the Guelphs and the Guelphic towns did not deny it in their strenuous resistance to the emperors and the Ghibellines. As late as 1354, when Charles IV. (of Luxemburg) made

In theory subject  
to the emperor.

his Italian expedition, the commune and people of Florence appointed syndics who should acknowledge him in their name as king of the Romans, and their true lord, and in their name take the oath of fealty to him. It was understood that the commune was bound to nothing else save that to which, with other communes of Tuscany and Lombardy, they had been bound of old; that the priors and gonfaloniers should be his vicars and no one else, that the commune and people should be exempt from all taxes, all ancient fines and the like, as well as from all jurisdiction but their own within their territory, etc. This was a kind of compromise; but the theory of the Guelphs, as we understand it, was that the Roman people created the emperors of old, and, acting through the church, conceded the election to the seven princes of Germany. "The liberty of the Roman people was in no way subject to the liberty of the empire nor tributary, like the other nations who were subject to the people and senate and commune of Rome, and by the said commune made subject to their emperor." \*

Florence was *in fact* free and had room to expand itself and to perform various acts of sovereignty, nearly as much as if there were no suzerain over it at a distance. It appears with substantial liberty, *first* :

Under the magistracy of consuls, a name which some of the towns in the Roman times gave to their chief municipal officer but which came in no direct tradition from the ancient consuls of the city. These

Consuls at Flo-  
rence.

\* See Capponi, Stor. d' Ital., i., append. v., where the capitulation between Charles IV. and Florence is given with some remarks of Matteo Villani and of the author. The words cited are M. Villani's, iv., 77, in Muratori, R. I. Script., xiv., 291.

new consuls were variable in number, in some towns as many as twelve, and the word came to be applied to the chief official persons in the guilds, and in companies of merchants, both in Italy and in France. At Florence there were six of them, although one may have been the president of the board, a number corresponding with that of the wards—*sesti*—into which the old town was divided. They were taken by election from the men of principal rank ; \* administration and justice were in their hands and they were assisted by a council of a hundred good men, which had a voice in financial and other important matters. The councils and perhaps the consuls were chosen by the active citizens meeting in a *parlamento*—for by this word the assemblies in the Italian towns were designated before it travelled north and put on different meanings.

It is probable that for a time a divided jurisdiction existed at Florence between her officers and the city-magistrates, when the Countess Matilda was the feudal superior. Prof. C. Hegel, ii., 188, expresses himself in regard to this transition period as follows : “ For the Tuscan towns the government of the two women, Beatrix and Matilda, was about the same as that of the bishops was for many of the towns of Lombardy ; it was a gently enclosing sheath of sovereignty, under which the freedom within gained room to unfold itself and acquire new vigor. Without doubt the margravines still held their courts with their counts or viscounts and the wonted judges and scabini of the towns ; they also granted privileges, especially for the benefit of churches and convents ; but this did not keep the town from acting with greater independence than before, from fighting out their quarrels undisturbed, as Lucca, for example, hers with Pisa, and finally they began to govern themselves by consuls of their own choice.”

\* Thus in 1192, one of the *Fifanti*, and one of the *Uberti* held the office. (Ammirato, i., 62, ed. of 1647.)



The classes of persons who first had a share in the government of the towns differed in different places. Classes of persons. In some, as Milan, there were three orders, *capitanci*, *valvassores*, and citizens; at Mantua appears only the order of citizens; at Florence, nobles without distinction of rank and citizens. The nobles were included in the commune if they had houses in the city, and this when they owned estates in the vicinity was a security against lawless attacks on the citizens when they went on commercial journeys. In fact, some of the cities took the measure of forcing the country-nobility into the towns, that they might get them more into their power. G. Villani says—although the account is suspected—that the emperor Frederic I., in 1184, on complaint of the nobles of the county against the commune, that the latter had seized their castles, took from it all jurisdiction over the county and the villages it contained (v. 12).

Not long after this, on the death of the emperor Henry VI. in 1197, the towns of Tuscany chose a prior or president with a council of rectors to assist him, and bound themselves to accept of no emperor, duke or margrave without consent of the pope. This shows us the pope as aiming by an alliance with the free towns to secure to himself a support against the imperial authority.

The twelfth century is remarkable for compilations and reductions of statutes, owing in part to the revived study of Roman law, and in part to the need of new provisions of law, caused by the increase of manufactures and commerce. Early laws. Pisa among the Tuscan towns made the first code in 1161, the materials of which were derived from customary law, from the remains of Lombard law, and from Roman law, which did not come down by tradition but was added by the lawyers who compiled the collection. (Hegel, ii., 223.) The statutes of Florence, which were probably collected in the times of the consuls, were repeatedly revised by special commissioners to whom was given the name of *arbitri*, and in the course of time received many additions. The older corpus of statutes seems to be distin-

guished, as the *costituto del comune*, from the *costituto* of the captain or defensor of the people, and the "ordinances of justice" formed a special code by themselves.

### § 184.

About the year 1207 the government by consuls came to an end or was in part superseded by that of a single magistrate called the *podestà* (potestà).  
 The Podestà. It is probable that several years before this date and as early as 1193 such an officer was at the head of affairs, and there may have been several years when the old and new forms of magistracy alternated.\* In that year (Ammirato, i., 62, book 1), a *podestà* whose name shows his Florentine extraction and *rettori* of seven arts or guilds are mentioned as having transactions with persons holding the castle of Trebbio. However this may be, the officer designated by this name was common in the towns of Italy at and after the time of the peace of Constance in 1183. He was indeed a representative of the emperor, as the supreme judge and military chief, but it does not appear that for this reason the Florentines adopted the office. He was there as elsewhere of noble or at least knightly extraction, a foreigner, and a doctor of law. He held his office for a year until 1290, when the term was abridged to six months. During the seignory of King Robert of Naples, vicars of his appointment superseded *podestàs* (1313-1322); there were two at once for a short time (1266), and the office, being abolished in 1502, when the grand council was instituted, gave place to a board of five judges. The *podestà* was not a supreme magistrate in reality, although his name was prefixed to public acts, and he

\* The anonymous author of the "Discourse concerning the Government of Florence from 1280 to 1292," inserted by Count Capponi in his recent history, i., 378, append. No. 2, and first published in the "Delizie degli Eruditi," ix., 256,—an exceedingly well-informed writer,—says that "la Podestà was most ancient in Florence. They say that it [the office] commenced in 1202. It is found much earlier, and is what in modern times is called in the masculine *il Podestà*. So we shall call it."—G. Villani assigns it to 1207.

kept the seal of the city, but rather a judge ; and when in the earlier times he was called to lead the troops in military expeditions, the authority was conferred on him by vote of the councils.

The podestà was chosen by electors whom the councils of the commune appointed for this purpose. On his arrival at Florence he swore in a *parlamento* or else before the council, to observe with his family the statutes of the commune. His family consisted, among others, of seven foreign judges, eighteen notaries and a number of sergeants or sheriffs. Of the judges, four formed with him a board for hearing cases of appeal in the last instance, and three were charged with hearing appeals from the town-judges of the wards of the city;—each of the three having two wards for his province. The whole work of public justice may have been at first in his hands, but after 1250 his jurisdiction was chiefly confined to criminal cases.

The reason for selecting a foreigner lay in the desire to find a man who should be impartial amid the quarrels of factions, of houses belonging to the same faction, and of the classes of the inhabitants. But Capponi remarks that, “as foreigners and seignors of high birth, they had no good understanding with the people, and felt little regard for the laws which they were called to execute” (i., 138).

Soon after the establishment of this office the county of Florence was made to swear obedience to the lordship or seignory of the commune (1218). Until then different parts of it had been immediately subject to various counts and gentlemen. (G. Villani, v., 21.) This marks either an increasing sense of independence or that it was felt necessary to take away feudal rights from the landed proprietors.

About the same time (in 1215), the strife between the Guelphs and the Ghibellines broke out into bloody feuds, the introduction to the strife being a family quarrel. A member of the Buondelmonti, a noble house which had been forced to come into the city in consequence of oppressing travellers by tolls at Montebuono, jilted

Strife of Guelphs  
and Ghibellines be-  
gins.

a young lady of the Amidei, to whom he had been betrothed, and married another from the Guelphic house of the Donati. He was killed on this account by some of the principal Ghibellines, and thus the strife spread through all the noble families. It is not our purpose to enter minutely into this long series of feuds. It is enough to say that through the reign of the emperor Frederic II., and the interregnum, and long after emperors succeeded who had friendly relations with the pope, Tuscany was divided, the towns waged frequent wars with one another, the principal men of the defeated faction fled from their homes, or were banished and then lived in exile until an opportunity offered itself of returning in the army of a foreign enemy. Nor was the spirit of faction confined to these two great parties, but new divisions arose in the triumphant party like those of the Bianchi and Neri at the beginning of the fourteenth century.

The Guelphs and Ghibellines divided, as Villani (v. 39) expresses himself, "only in respect to the signoria of the state, and the church [the emperor and the pope], but as regarded the condition and welfare of the commune they were agreed." Neither party strove to abridge the growing industries of the city, but they were jealous of each other, and wanted exclusive control. The wealthier, untitled class, the *popolani* or *popolo grasso*, were, for some time, not drawn into the strife, although they were in greater part Guelphs, and felt the importance of keeping on good terms with the pope. But the nobles were so factious and so unwilling to submit to law that the wealthy class felt it necessary to get control of the republic, and finally broke down the power of the nobility and excluded them from all offices in the state. This seems to have been necessary for the prosperity of Florence, but it was a new tyranny added to the old plague of a factious and proud nobility.

The Ghibellines gained a great victory over the Guelphs at Malaperti in 1260, with the help of the German cavalry of king Manfred, so that the Guelphic families went into exile. Then Charles of Anjou, brother of Louis IX. of France, was



invested with the Italian dominions of the Hohenstauffen, by the pope, and Manfred was slain at the battle of Benevento (1266). Two years afterwards Conradin, son of Conrad IV., of Germany, and the only legitimate descendant of Frederic II., came down into Italy to claim his own, but was defeated at Tagliacozzo by Charles, and afterwards put to death (1268). The Sicilian vespers (1282) were followed by the loss of that island to Charles, who died in 1285. The Guelphs, until then, were successful, and still acknowledged the claim of the descendants of Charles. At Florence the fear of the opposite party led the Guelphs and the people to invest the heads of this faction from time to time, when danger came upon them, with the seignory of the republic, first was Charles of Anjou (1266); then Robert, king of Naples, at the time of the Italian expedition of the emperor Henry VII. (1309); then the duke of Calabria (1326), on account of fears from the emperor Louis of Bavaria, and Castruccio, lord of Lucca; after which, in 1342, Walter of Brienne, duke of Athens, who had been the duke's lieutenant in the war with Lucca, was elected seignior for a year and then for life (1342). The danger of this practice of calling in a foreign sovereign or commander, and investing him with the chief power in the republic, now showed itself clearly; for had not this worthless man soon ruined his own cause, he might have been a tyrant like the Visconti of Milan, and established a dynasty in his own family.

### § 185.

We are now the better prepared to trace the more normal political changes in the constitution of Florence. "The first people." The first of these, belonging to the year 1250, is called by Villani (vi., 39) the *primo popolo*, and marks the time when the people, that is the upper class of the people, made the first decisive movement to unite for self-defence, and for combination against the nobility. The Ghibellines were now in the ascendant. The leading Guelphs were scattered abroad, and the other faction domineered over the citi-



zens. "The good men" of Florence, that is, the leading and more opulent citizens, met together, deposed the podestà then holding office together with other officials, appointed thirty-six *caporali* or heads, and a new magistrate whom they called the *capitano* of the people, with whom they associated twelve *anziani* (ancients) to serve as his council. More important still was the formation of twenty companies of civic militia, who were to serve under their appropriate banners, subject to the summons of the *capitano* and the *anziani*, except in wars outside of the city, when the troops, as before were subject to the podestà or other regularly appointed commander. This reminds one of the election of the tribunes of Rome, and was, in some sense, the beginning of a double people. Indeed from that time there were two corporate bodies, the commune including all the citizens, and the *popolo*, with the *capitano* (called also *defensore* and *rettore*) as their head. The thirty-six and the twelve appear afterwards as the two *councils of the people* with altered numbers. The *capitano* became a chief judge by the side of the podestà, holding his office at first for one year, afterwards for six months, and elected in a similar manner. He also was required to be a foreign knight, and a doctor of the law; and his jurisdiction embraced civil cases, together with acts of violence, extortion, and fraud. Like the podestà, he also, had his judges and notaries, whom he was to bring with him to the city. The institution of the *capitano* proved to be of no great importance in the subsequent history of the constitution, but the spirit of the *popolo* was raised, and the wealthy class felt its unity: as they showed in 1258, when a conspiracy of the Ghibellines in the city "to break up the people of Florence" being discovered (Vill., vi., 65), and the nobles, summoned to appear before the podestà for having maltreated his subordinates; a large number of the Uberti and their noble friends were driven out of the city. The people of Florence which at that time ruled the city, says Villani, was exceedingly proud, ready for high and great undertakings, and thought much of themselves. Their self-conceit

was most severely punished at Malaperti two years afterwards (1260).

After this great defeat, Count Guido Novello acted as  
The thirty-six. podestà for king Manfred at Florence, and the  
 Guelphs were in a miserable plight, all Tuscany  
 being in their enemies' hands. The nobility were scattered,  
 but the citizens showed a disposition to resent the exactions  
 of the Count and his German cavalry. Accordingly, a middle  
 course was pursued, in the appointment to the office of  
 podestà, of two members of a religious order of cavaliers,  
 called the cavaliers of St. Mary, but known to the people as  
*frati godenti*, on account of the life of luxury and idleness to  
 which the order was addicted. They pretended to belong,  
 one of them to the Guelphic, the other to the Ghibelline party,  
 and received the sanction, if not the express commandment  
 of Pope Clement IV.\* They appointed thirty-six "good  
 men" of both parties and both classes to assist them with  
 their counsel, and to provide for the expenses of the com-  
 mune. That the meetings of the thirty-six were held daily  
 in the buildings of the consuls of the art or guild of Calimala  
 shows that the principal merchants took part in their delibera-  
 tions.

It was during the official sway of these thirty-six good men  
The arts or guilds. that the first known organization of the seven  
 greater arts or guilds, or, at least a formal  
 recognition of them, took place. Guilds or "schools" appear  
 in Ravenna almost three centuries before the middle of the  
 thirteenth century; they had ere this been founded in many  
 parts of Europe, and may have flourished at Florence long  
 before they acquired a legal standing. The organization  
 consisted in giving them heads (*capitudini*), afterwards called  
 consuls, with assessors (*collegi*), and captains of military com-  
 panies, and the right to have gonfalons or banners of their  
 own with special armorial bearings. By these means they  
 were united together for the defence of the city, and their

\* Comp. Capponi, i., 57.

guild-feeling was greatly increased. The number of guilds already existing was twelve. The first seven were the judges and notaries, the merchants of French woollens or the art of Calimala, the exchangers, the guild of wool, the physicians and druggists, the silk weavers and mercers, and the furriers. The five next guilds, sometimes called the middle ones, *mezzani*, which were incorporated somewhat later, consisted of butchers, shoemakers, carpenters, masters of wood and stone, and "rigattieri" or second-hand dealers, with whom subsequently linen drapers were united. The nine inferior arts, which strove for political power at a later period, constituted the lowest of the industries which assumed a corporate form. Within some of the leading arts there were companies of workmen who seem to have depended, in part, on the officers of the arts for settlements of disputes. There were, at one time, twenty-five industries thus subordinate to the great art or guild of wool. This lower stratum of the people consisted, in part, of persons who were without civil rights, from the district and county, or from places beyond the jurisdiction of Florence.

The Ghibellines at Florence thought that the "thirty-six" were inclined to favor the Guelphs, whom the people also favored as the less aristocratic of the two,\* and the pope's friends. Disturbances, therefore, arose, in which king Manfred's podestà, Count Guido Novello, made a cowardly escape from the city, although supported by fifteen hundred horsemen. With him the principal Ghibellines fled, and never afterwards did this faction hold the republic under its control. Charles of Anjou, now king of Naples, and appointed vicar imperial in Tuscany, comes to the help of the Florentines, and the *signoria* is given to him for ten years.†

\* Comp. Ammirato, i., 133, book ii.

† Power was conceded to Charles of Anjou the more readily, because an imperial vicar accorded with the theory of the emperor's supremacy, which was still admitted in words. So the vicars and others to whom the signoria was granted afterwards on certain conditions, by vote of the city for a time, did not seem to be inconsistent with the idea of a practically independent republic.

At this time some changes took place in the councils,\* but far more important was the institution of the The Guelfic party. Guelfic party, which had for its prime object to manage the confiscated property of Ghibellines, and which, besides receiving the approval of the pope and the king, was formally established by law of the state. The property referred to was divided into three parts; one was assigned to the commune, another to the Guelphs who had suffered when their enemies were triumphant, and a third was kept together in the hands of this corporation. The Guelfic party had captains and other officials, and was partly a police to watch the Ghibellines, partly a board to give aid and countenance to foreign Guelphs, and partly the guardian of these extensive estates.

In 1273, Pope Gregory III. spent some time in fruitless attempts to reconcile the parties in Florence. Peace of Cardinal Latino. After his death, his sister's son, Cardinal Latino, was commissioned by Pope Nicholas III., to carry out Gregory's projected peace. This was at the solicitation of Ghibelline exiles, and the court of Rome was the more willing to adopt this policy, because the Hohenstauffen family was now extinct, and Charles of Anjou, the head of the Guelphs, was not very obsequious. The peace known by this cardinal's name, the leading provisions of which are given by Ammirato (i., 159, b. 3) involved,—besides some restitution of estates, and relegations of certain persons together with promises of reconciliation to be made between individuals of the parties,—the appointment of fourteen men, eight Guelphs and six Ghibellines, who were to be put at the head of the state. The fourteen were chosen for two months by electors appointed by the retiring fourteen, assisted by citizens called to aid them in this work. They continued to be the supreme magistrates, or *signoria*, from 1280 to 1292.

\* Comp. Villani, ii., 16, Macchiav., vol. 2, p. 287 of his works, Milan ed. of 1803.



## § 186.

The fourteen men from the two parties not being able to agree together, and there being danger of seriously evil results, some of the leading men of the arts consulted together and procured a new board to be put at the head of affairs, which was called the priors of the arts. The consuls of the art or guild of Calimala set this on foot and three men are mentioned as having been elected by a part of the arts and by three of the wards, who like their predecessors held office for two months. After their time was out, six were chosen, one for a ward, and the other principal guilds united in the plan. It thus became the lawful government and continued, as long as the liberties of Florence lasted, to be the ordinary supreme administrative board of Florence. In form it was no great innovation; but in spirit it amounted to a transfer of power from the commune and the citizens in general to the guilds and for a time to the seven higher ones. It was, in short, an abridgment of the power of the nobility without intending at first to give any share of power to the nine lower guilds. The citizens of the wealthy class, the middle order, meant to rule the republic, excluding both nobles and plebeians. A plan like this could not fail to bring on a struggle with the old *grandi*, or nobles, and another was likely to occur with the lower guilds and the working class outside of them. But the *grandi* were already far weaker than they had been a century before, and were incapable of union. Quite a number of them also had gone into business, as merchants, exchangers or manufacturers, and had been incorporated into the guilds. Some figure as the champions of the new constitution. On the other hand, the lower class, the *popolo minuto*, were so dependent on the upper class that no immediate danger could be discovered in that quarter.

The priors varied in number, from six to twelve, and when the *wards* or *sesti* were replaced by *quarters*, continued to be eight. They were at first elected, as the "fourteen" had



been, by the former priors and by certain citizens called *richesti* from being requested to act with them. After 1286 and until 1292 they were chosen by the retiring priors and the heads of the twelve greater guilds. After 1292, to the numbers of electors were added such wise and good men as the priors might select. Other changes in the mode of election of the priors will be noticed in the sequel. The following persons could not be chosen :—a head of a guild or wise man called to take part in the election, a kinsman of a prior who had a part in the election, any one who had been a prior within two years, any but actual *artefici* or members of the guilds, and a *cavalier*. If chosen, such a one could not lawfully serve. The priors during their two months were to eat and lodge in one house, to hold no discourse with any one except in a public audience, and not to leave the city.

At the same time as the priorate was instituted, the nine inferior arts were called into existence and organized with heads (*capitadini*), syndics, banners, etc. They were the wine-dealers; greater taverners; salt, oil and cheese sellers; tanners in wholesale; corslet and sword-makers; lock and iron-smiths; carriage, target and shield-makers; cabinet-makers in wholesale; and bakers.

The upper guilds were flourishing under the new government, but the *grandi* or magnates could not give up their feuds, nor could they forget the times when they were lords of the city and did as they pleased, —while now they were governed. The unquiet and lawless class made stronger laws necessary; and so in 1292 some of the influential men of the *popolani* united their counsels to devise some more effectual legislation, which would repress the violences of the *grandi*, and keep them from ever again getting the reins of power into their hands. At their head was Giano della Bella, of an old noble family, which had gone down into one of the guilds. He is charged (Ammirato, i., 187, book iv.) with resentment against a nobleman, one of the Frescobaldi, who had grossly insulted him, but the general voice of historians is in his favor as being a high-

Ordinances of justice in 1292.

mindful and patriotic man. It is interesting to find also that Dante, likewise of noble origin but now a popolano, was invited to these consultations. The first ordinances of 1292, *i. e.*, of Jan. 1293 of the new style, were supplemented by others in subsequent years, especially in 1306, and were repeatedly modified afterwards. Sometimes they seem to have slept unexecuted; sometimes they awoke to be applied when the *grandi* were disorderly; but they always remained on the statute book and survived the nobility on whom they were intended to act and did act as a check. It would seem that some of the commotions of the fourteenth century were due to the desire to restore the old families to power and to overthrow the ordinances, but the tide was too strong in the other direction; many families became popolani which had belonged to the noblesse; to *be a grande finally became equivalent to an incapacity for holding political office; and to be made such was one of the penalties with which prominent citizens were visited by their political enemies.*\*

The ordinances apply to wrongs committed by grandi and not to popolani involved in their quarrels, nor to the wrongs of grandi against their domestics. If a grande wounds or kills a popolano the severest and most summary justice must be administered by the podestà (*passim*). No composition between them and injured parties is allowed. Proof by an injured party's oath can be admitted, or, if he be dead, by the testimony of his nearest relatives and of three witnesses declaring what is public fame. (Rubr. 6.) Wounds injuring a limb subject a grande to the payment of two hundred florins,

\* All the historians refer to these ordinances. So also does Hüllman in his *Städtewesen der Mittelalt.* iii., 435-438. I have found Capponi's account of some of their contents the best (*i.*, 93, 94). I have also had in my hands, kindly lent by the superintendent of the Boston Public Library, Bonaini's publication of the first and incomplete Latin draft of the ordinances with protocols etc.; and the Italian redaction of 1324 given out by Emiliani Giudici, in an appendix to his *Storia dei Municipi Italiani* (pp. 302-422), which also contains the statutes of the guild of Calimala. Finally, an excellent programme of Prof. C. Hegel (Erlangen, 1867) has been of great use to me.

and his hand is to be cut off if he fails to pay the money within ten days. If a *grande* has paid only part of his fine, his sureties—it would seem that every *grande* was required to have sureties for his peaceable behavior—are to pay the rest. If it surpasses the amount for which they gave security, a father must pay for a son, a son for a father, a brother for a brother, being his father's son, and so on. (Rubr. 80.) Other provisions keep the *grandi* out from all places and offices except the councils of the commune, or exclude them from the registers of citizens between sixteen and seventy. (Rubr. 58.) Penalties were imposed on a podestà who neglected his duty in respect to the ordinances. The *grandi* could not accuse nor bear witness nor appear in court against *popolani*, without consent of the priors. (Rubr. 43 in *Capponi*.) They were not allowed to live within one hundred and fifty ells of a bridge, nor leave their houses in a time of uproar, nor appear at weddings or funerals with armed retainers. (Rubr. 49-50, *ibid*.) These may suffice to show the spirit of these strange ordinances, passed by the most enlightened men of Florence, (Dante perhaps being one,) and by the public councils.

To aid in the execution of these laws a *gonfaloniere della*  
Gonfaloniere della  
giustizia. *giustizia* was appointed; who was to belong to one of the greater guilds, to have a vote with the priors, and to pertain to no house from which any of the priors came. This office was to last two months like theirs, and to be filled successively by persons from the six wards of the city. He was elected by the retiring board of priors and certain assistants. He had in charge the gonfalon of the people and a body of elected foot soldiers was under his command; which consisted first of one thousand, then was enlarged by one thousand, and in 1295 by two thousand more. And similar regulations in regard to the county and district of Florence were made at the same time, the intention being, apparently, to have a militia ready on any disturbance proceeding from the *grandi*.

The *gonfaloniere* of justice being at the head of the city

troops and one of the signori, or signoria, as the priors were called, was not in a situation to aid in carrying out the ordinances of justice for which the office was first devised. It was, therefore, decided by the councils and the signori, that a new officer should be created to execute the ordinances of justice. He was called an *esecutore*, was to be a foreigner, to hold his office like the podestà and capitano for six months, but, unlike them, to be in condition not a nobleman but a man of the people, and not a doctor of laws; and to have like them his subordinates, judges and others. He had, also, a certain supervision of the conduct of the podestà and capitano in regard to questions arising out of the ordinances of justice. It is unnecessary to speak further of this magistrate, for, although the office continued into the fifteenth century, his occupation assigned to him by the ordinances was then gone, and he sank to the condition of a bailiff. (Capponi, ii., 321, 365.)

### § 187.

Every principal authority at Florence had its council. That of the priors and gonfaloniere consisted, in 1306, of sixteen banner-bearers of the companies of citizen troops. These companies had their origin, as we have seen, in the time of the *ansiani* (1250), and were then twenty in number. Restored or reformed by Cardinal de Prato, who, in the strife of the Bianchi and Neri went to Florence as a peacemaker from the pope, they were, in 1321, associated with twelve good men, two from each ward, chosen for six months, as the assessors of the signori; and were regarded as one of the most honorable bodies in the state. All important business was submitted by the signori to these "*collegi*," as they were called, but they were not necessarily in perpetual session.\*

\* Leonardo Bruni, chancellor and historian of Florence, who died old in 1444, wrote a sketch of its constitution in Greek (edited by C. F. Neumann, 1822, Frankfort on the Main), in which he calls the gonfalonieri of the companies, the *ἄρχοντες των φυλῶν*, consuls of the



Between the time when the gonfaloniere of justice was first created (1292) and the institution of the *esecutore* (1306), several important events occurred which we must notice in passing. One was the banishment of Giano della Bella, the author of the ordinances, obtained by the vengeance of the *grandi*.\* Another was the bitter strife between the Bianchi and Neri, parties of Guelphs, of which the Cerchi and Donati were respectively heads. Of the two parties the Bianchi, to which Dante belonged, and with six hundred of whom he went into exile, may be said to have had a leaning towards Ghibellinism, but the strife originated in a division between members of the great and powerful family of Cancellieri at Pistoia. To compose it, the pope, Boniface VIII., sent Charles of Valois, brother of Philip the Fair of France, to Florence. This was, without question, a plan of the Neri; who did their best to make it believed that their foes were Ghibellines. He came, with twelve hundred horsemen, under an unusually solemn authorization of the signori, seconded by the general council of the Guelphic party, and by the votes of all but one of seventy-two trades included under the guilds, and gave his promise that he would exercise no jurisdiction, nor accept any honor, nor change any usage or law.† (1301.) But he did not keep the oath which he made to this effect, either because he was unwilling or was unable; the priors who entered office Oct. 15 were made to resign, and a

guilds, *i. e.*, and makes the guilds sixteen in number. For the last statement I cannot account, and for the first only by his seeking to give a Greek coloring to his works at the expense of truth. Just afterwards he is willing to be inaccurate again, when he says (p. 80), that there are two great councils, one of the people, the other of the *ἀριστοι*. But the people could belong to the council of the commune as well as of the *ἀριστοι*.

\* Comp. Ammirato, i., 123, b. iv., Villani, viii., 8, and Scheffer-Boichorst, *Flor. Stud.*, pp. 89-91. (Leipz., 1874.)

† So Capponi. Villani (viii., 47), who was present when authority was given him "to heal the quarrel of the Guelphs," and Ammirato (i., 213, B., iv.), say that the signoria and guard of the city were placed in his hands. Capponi (i., 118), interprets this as merely "parole d' onore."



new board was chosen early in November to take their place : \* the many exiled Neri, and among them the head of the party, Corso Donati, returned without law : soon the whole city was filled with confusion and Charles left the city to return to France. Many sentences of banishment were issued against the Bianchi during his stay, and after his departure (1301-1302). The pacification effected by Cardinal da Prato (1304) brought back a degree of peace, which was more likely to be permanent when the lawless Corso Donati, condemned as a rebel and traitor, was slain in 1308.

The presence in Italy of the Emperor Henry VII. (1310-1313) led to the appointment of Robert, then duke of Calabria, as signor of the city of Florence for five years; on condition, however, of making no changes in the government except that of putting his own vicars in the place of podestàs. His authority was afterwards prolonged until 1322. This plan was thought necessary on account of the formidable Ghibelline leaders in Pisa and Lucca, the latter of whom, Castruccio Castruccani, died in 1328 about the same time with the duke of Calabria. At this time two changes were made in the constitution which call for our attention—the simplification of the councils and the *squittinio*, as it was called, from the Latin *scrutinium*, united with the drawing of magistrates' names by lot.

#### § 188.

The councils of Florence had been before this five in number, besides the *collegi* of the priors. They were the council of one hundred, the oldest of all; a smaller and a larger council of the commune, ninety and three hundred respectively; presided over by the podestà, and two councils of the people (or of the *capitano* and heads

\* This change seems to be that which Dante has in his mind (as Scheffer-Boichorst, in his *Flor. Stud.*, 212, shows) in *Purg.* vi., near the end.

—che fai tanto sottili  
Provvedimenti, che a mezzo Novembre  
Non giunge quel che tu d' Ottobre fili.

of twelve guilds), a smaller of eighty members called the *credenza*, and a larger. Now these were all reduced to two, one of the commune of two hundred and fifty members, among whom *grandi* might sit, and one of three hundred to which only *popolani* could be eligible. The elections were made before 1282, by the podestà, capitano, and priors (the three greater rectors as they were called), and the time of services, in the larger ones at least, was one year. The council of the people consisted, in century XV., of ten for every gonfalon, or one hundred and sixty with the signori, their *collegi*, and some other officials. For the clearest account of them at that time, I refer to the anonymous author of "A Discourse on the Government of Florence, between 1280 and 1292." \*

After the councils were reduced to two, questions of administration proposed in the signoria and approved by the black beans of two-thirds (counting the eight priors and the gonfaloniere), were submitted to the *collegi*, and then to the council of the people. If this council gave its assent, the proposition was submitted the next day to the council of the commune, and, if it passed through, needed no further ratification. New laws, and I believe changes in laws, needed the assent of the people, called together in a parlamento by the gonfaloniere of justice. Other councils, as that of the two hundred which took the place of the two just mentioned, in 1471; or of the earlier two hundred created in 1411, under the influence of Maso degli Albizzi, without whose consent no war nor foreign expedition, league nor confederation was lawful; or of the important council of seventy in the time of Lorenzo de Medici;—which were late experiments to sew new cloth on the old garment, or to gain some temporary expedient, we need barely mention.

The *squittinio* of 1328, first projected in 1323, was an important change. The plan was to entrust to  
Squittinio.
a large committee of official persons and their assessors, the business of determining what citizens were fit

\* In the appendix to Capponi's Storia, vol. I.

to hold office, and then to put the names in a bag or bags ready to be drawn by lot, and kept under watch until the time for drawing came. In 1328, the committee consisted of ninety-eight, and every one was rejected who got only sixty-eight votes out of this number. The bags were put into a coffer, and the coffer was fastened with three locks, one of the keys of which was committed to the captain of the people, and one to the friars of each of two religious houses. The coffer was opened under due regulations three days before the expiration of the term of the actual priors, and a new set were chosen. In 1343, when the squittinio was made by two hundred and six citizens, thirty-three hundred and forty-six were set aside (if I understand the passage), so that not the tenth remained for the drawings to be made every two months.\*

In the provisions of the *balia* of the important year 1393, we read (Capponi, ii., 515) that if any persons whose names were put into the bags for priors deserved to be *gonfalonieri*, they could be taken out and put into the bag for that magistrate, and, furthermore, that persons whose names were in the bag for that magistrate, if judged to be unfit for the office, might be taken out and put in the bag for priors in the same quarter. (516.)

These "imborsations," at one time, took place once in five years; bags were provided for the priors, and separate ones for the *gonfalonieri* of justice and the same process must have been gone through with the *collegi*. So also the councils were chosen by lot, and the names put into the bags for each guild, not at the time when the squittinio for the higher officials was made, but when occasion required.†

It is evident that in the selections of persons fit for office,

\* Capponi, i., 242, "posti a partita 3346, ma non rimasero," etc. Ammirato, i., 482, b. 9, furono nominati—di quali non rimase il decimo."

† Leonardo Aretino's Greek account of the constitution of Florence, ed. Neumann, p. 80.

there was great room for intrigue. If a party predominated largely in the committee of selection, the other would be excluded. And at a later period it would seem that great knavery was practised in this respect.

The *divieto* is to be considered in connection with this mode of appointing to office. This was a disqualification for holding office, for various reasons. If a person whose name was drawn was below thirty, or was a debtor to the treasury, or had a parent, a child, or brother in a similar office, he was disqualified. So a prior could not fill the same office again until three years had elapsed, and relatives could not succeed one another within six months.

The mode of appointment to office above described was intended to prevent factions from choosing their candidates, and gave a chance of office to a wider range of citizens. There can be no doubt that upon the lottery principle it increased the desire of office, and on the other hand, it explains, in part, why there was so much eagerness to put legal obstacles in the way of holding it.

In 1342, Walter, of Brienne, duke of Athens, who had acquired reputation under the duke of Calabria, was chosen, on account of the incompetence of the military committee of citizens, to be captain-general of war for one year, and afterwards the signoria was given to him in a regular way. Then in a tumultuary meeting it was voted to him for life. The plotters were *grandi*; the mob which conferred the power consisted of their retainers and the dregs of the people; and he was installed in the priors' palace by *grandi*, who forced the doors open for his admission. The ordinances of justice which they designed to remove were suspended, and he made other changes; but his worthlessness aroused the hatred of all classes, and he was driven out of the city in July of the next year. The *grandi*, having had a share in the rising against him, were admitted to a participation in the signoria, and other offices; but the peace between the orders was not lasting, an armed contest of *grandi* with *popolani* and their allies from abroad (Sept. 24, 1343), ended in the

defeat of the former, and they lost their power forever.\* From this time, for the most part only a place in the councils of the commune was open to them, with such extraordinary and temporary offices, and such commissions, as would not arouse the jealousy of the people.

After this defeat of the grandi there were some changes in the constitution. The priors were made to be eight in number, two from each of the four quarters into which the city was now divided; two only were to belong to the seven upper guilds, three to the people of the middle guilds, three to the lower, and the gonfaloniere of justice was to come from each of these parts of the people in turn. A large number of families of grandi, five hundred and thirty in all, but not for the most part of the older houses, were allowed to go down and become incorporated in the guilds. A new registry was made which we have spoken of elsewhere, and the ordinances of justice were modified.

### § 189.

The fourteenth century, besides these revolutions—four governments having succeeded one another in less than a year—was memorable on account of the bankruptcies of a number of bankers, caused especially by the failure of Edward III., of England, to pay his debts (1345); and then came the great pestilence of 1348.† About this time the lower guilds, whom the last changes had raised politically and filled with new hopes, began to aspire after the government of the state. In the lower guilds there were persons of foreign extraction who had received citizenship; to prevent whom from obtaining office a rule was made, in

\* Comp. Villani, xii., 19-21; Ammirato, i., 455-482, B. 9; Capponi, i., 221-248. The grandi, says the latter, "were half destroyed in the oppression of the Ghibellines, half of the rest in the persecution of the Bianchi." Others became popolani; some families died out.

† We may mention here that in consequence of the mortality the twenty-one guilds were for a time reduced to sixteen.



1346, that no foreigner admitted to citizenship could hold office unless he, his father and grandfather had been born within the county of Florence, although his name had been put into the bag. Another law, of 1347, enacted that a person condemned as a Ghibelline from 1301 onward by accepting office was made liable to a heavy fine ; and six witnesses declaring him such on public fame were enough to prove the charge. Those who had elected him, and those who should venture to propose the revocation of this law, were exposed to the same penalty and to the loss of office, even if they were priors. (Capponi, i., 281, 282.) An earlier law had forbidden foreigners to act as attorneys in any case or business (ib. i., 277).

These laws were due to the influence of the captains of the Guelphic party who now began to show a new and dangerous activity. Why should they, after comparative inaction for a long time, come forward to the front rank of political importance, when there was nothing to fear from exiled Ghibellines, and the old lines of party had faded out ? The election of the Emperor Charles IV., in connection with the intrusion of strangers into the guilds, has been assigned as the cause ; but there was nothing to fear from the emperor then, or afterwards in his two visits into Italy. The laws spoken of, together with subsequent events, reveal a design of the existing aristocracy, or of those popolani who desired to keep the lower people from increasing their political importance, to retain power in their own hands and prevent the lower guilds from ruling the city. Nowhere could a plan for this purpose have been more likely to be successful than in the *parte Guelfa*, an old institution with large estates in its hands and managed even then by grandi and by popolani of the older families.

To enter minutely into the movements of the Guelphic leaders is out of the question ; we will only attempt to show how these movements bore on the Florentine constitution.\*

\* Comp. for the feelings of a contemporary, M. Villani, ii., 2 ; viii., 24, 31, 32 (in Muratori, Rer. Ital. Scr. xiv.) and for the legislation and history, Capponi, b. iii., ch. 6 and 7.

Their political aims were covered up under the mild terms, *ammonire*, *ammonizione*, which denoted a warning, given to an active citizen and generally to a citizen in one of the lower classes, that he was suspected to be a Ghibelline and that until he cleared himself (for which the word *chiarire* was used) he could not safely accept an office.

These admonitions and laws aiming at their control appear from time to time down to the year 1378.\* In 1353 the two families of popolani, the Albizzi and Ricci, who were at the head of the Guelphic party, broke out into a feud, and thenceforth the latter seemed to aim at a milder and more popular course than the other. In 1366 Uguccione de' Ricci caused a law to be passed which increased the number of the Guelphic captains to nine, of whom two were to be grandi, five popolani and two from a lower guild. Two-thirds were necessary to try a person declared to be a Ghibelline, and a board of twenty-four citizens was appointed to hear an admonished person in his defence. Two-thirds of the nine captains and of the twenty-four, or twenty-two in all, were necessary for his condemnation. In 1377 the "fury of *ammonizione*," as it has been called, raged with especial violence. Eighty-seven instances of it belong to the nine months before July, 1378. Through these years the tyranny of this Guelphic party was intolerable, not because they put their foes to death or sent them into banishment; but because they determined by irresponsible tribunals who should have political rights in the state. A *divieto* or exclusion from office of this kind, as Capponi remarks (ii., 2), "might not be regarded as a thing equal to the terror it inspired and to the effects which followed from it. But public life had so entered into the very marrow of this people that not to have a share in the state seemed like being nothing."

In 1378, occurred the "tumult of the ciompi," or lower class, for which there were various causes: the jealousy between the upper and lower guilds; the dissatisfaction of the operatives with their wages; the

Tumult of the ciompi.

\* More than two hundred were admonished between 1357 and 1366 Macchiav. Hist., book iii., 369, Milan ed. 1804.

burden of debt; and perhaps machinations of a party opposed to the Guelphic faction; which went far beyond the designs of their authors. "The most powerful causes," says the historian just quoted (ii., 6), "of the disturbances of this people of Florence" (or, one might say, the ultimate causes) "were, —besides the arbitrary distribution of the burdens put upon the many by the few, luxury, the immoderate desire of riches, and, through the greediness of gain and profuse living the incessant agitation of the people to the very bottom by many and rapid changes of fortune."\*

The tumult, in order to be fully understood, must be looked at in its particulars, for which we have no room. Suffice it to say that, on first breaking out in a blind way it was checked for a time by measures tending to pacify the *ammoniti* and the people; but that it broke out again three weeks afterwards through a plan of the lower guilds to seize the power of the state. The signoria at that time were overawed and left their palace in the power of the mob, who on the spot chose a wool-carder, Michel Lando, as gonfaloniere. He accepted, and on the following day was chosen in a public *parlamento*, with a form of legality, to fill the office until the current term should expire. Authority was given to him and other commissioners to reform the constitution (*reformare la città*), especially to create new priors and their *collegi*. Then the

\*The brief account of this tumult given by Gino Capponi, then living and of the family of the modern historian whom we have often quoted (in Muratori, *Rer. Ital. Scr.*, p. 1104 and onw.), makes it evident: (1.) That the tumult was due to what the *parte Guelfa* had done. A witness before the priors, who was implicated in a riot, said that many *ammoniti* had solicited him and others to make a stir (p. 1113). (2.) Dissatisfaction of a number of trades, under the control of the great guild of wool made them wish to get out of this subjection, as having been badly treated (*ibid.*). (3.) One of the gonfaloniers of the companies charged Salvestro dei Medici (who was gonfaloniere of justice and abandoned his post in June, 1378, because he could not carry a measure against the aristocracy in the board of priors and their *collegi*) with being at the head of the plot. Salvestro confessed to the priors of August that he knew something of the designs of the *ammoniti* (1115). His friend Benedetto Alberti showed his sympathy with the rising at its commencement.

commissioners called three new guilds into being, the first consisting of tailors, doublet-makers, cloth-dressers and barbers ; the second, of carders and dyers ; the third, of the *populo minuto* or populace. The signoria was also reformed ; three priors were to belong to the highest guilds, three to the next in rank, three to the new ones ; and the gonfaloniere of justice, counting him one of the nine priors, was to be selected in turn from each of these divisions of the people. A *squittinio* or registration was held, as usual, by a specially appointed committee, but the business was left chiefly in the hands of the members of the inferior guilds. A third act of the "tumult" took place when new priors were about to succeed the old, but it was repressed by the energy of Michel Lando, who, in his brief rule, showed courage and moderation. This closing scene cost the life or goods of a number of citizens condemned by judicial process.

A number of changes in the government were made at this time. One was, to abolish the new guild of the lower people, the twenty-fourth. Another, to give four priors to the great guilds and five to the inferior. The council of the people was made to consist of forty from each quarter, the council of the commune of the same number with ten *grandi* from each quarter. Provisions which had been made for the relief of debtors were abrogated. In short, the first beginnings of a reaction were already apparent.

The inferior guilds were now masters of the state, and they exercised their power against many in condemnations to banishment or death. Among those who suffered death was Piero degli Albizzi, who had been banished from Florence, and now was taken up on a charge of conspiracy. On the other hand, two of the chief citizens who had been leaders of the people, one of the Strozzi and one of the Scali, for attempts to excite a sedition, were sentenced to death ; one died, the other escaped death by flight. The upper guilds seized this as a favorable time for recovering their superiority, and a reform commission was appointed. The results were the annulment of two new guilds of 1378 ; a general restora-



tion of men banished or deprived of civil rights since the tumult of that year; the equality of the higher and lower guilds in the number of priors assigned to them; the choice of a gonfaloniere always from a higher guild; and the concession of a majority of one to the same guilds in the council of the people and in several of the standing boards (1382).

The changes now going on show that the upper class was recovering its ground. The attempt was successfully made by the aristocracy to gain the favor of the people; and they felt themselves strong enough even to banish some of the eminent men who had leaned toward the popular side, such as Salvestro dei Medici, who was obliged to leave Florence for five years (1383), and Benedetto Alberti, who, with his house, was disqualified from holding office, and was banished to the distance of a hundred miles. Besides this, the old weapon of "ammonzione" was again used by the less popular party.

#### § 190.

Perhaps the year when Maso degli Albizzi was drawn out as gonfaloniere (1393), may be fixed on as the point of time when the government came permanently into the hands of the upper class, or the *ottimati*. To secure their position they had already diminished the share of offices of the lower guilds from one-third to one-fourth. Now, by charges of conspiracy, and in various ways, in a few years the whole family of the Alberti was ruined. Lombardy was full of banished men (Capponi, ii., 80); the popular party lost its great supports. Vieri dei Medici was begged to put himself at the head of the people, and if he had been more ambitious than good, Macchiavelli thinks that he might have got the government into his hands, but he refused. (Comp. Ammirato, vol. ii., 840, p. 891.)

The *ottimati*, or oligarchy, remained in power under Maso and Rinaldo Albizzi and Niccolò da Uzzano, the statesmen of the party, until 1434. The state was ably managed; Pisa, Cortona, Leghorn, were incorporated into the republic; the industries were flourishing, and it was in this century that



the silk guild reached its highest point of prosperity. The constitution in various respects had become a form, one may say, a shell. There were no longer disputes between upper and lower guilds,\* but rich and poor divided society. The men at the head of affairs saw in Giovanni dei Medici one who on account of his wealth and great popularity might prove a formidable rival; but he seems to have been unambitious and prudent, content to be a great merchant and money-lender—the richest man of Florence, if not of Italy. (Capponi, ii., 153.) His sons, however, Cosimo, and Lorenzo, the elder, had greater political aspirations, and it might justly be suspected that if they came into active political life, they would pull the Albizzi party down. He died in 1429, recommending to his sons to be always on the people's side, but not to seek to lead the people, nor be the heads of a section, nor authors of disturbances in the republic. Niccolò da Uzzano died in 1432, depriving the ruling party of its wisest counsellor. Just before the death of Giovanni, the tax system was thoroughly revised, yet so as to place it in the power of the reigning party to distress a political adversary by unjust assessments.†

### § 191.

The father of Rinaldo degli Albizzi, Maso, above spoken of, had kept his place at the head of his party and the state, and had been acceptable to the inferior class; but Rinaldo, although an accomplished man, wanted prudence. He felt that Cosimo dei Medici could not fail to become an active rival, and resolved to crush him. By his influence the signoria cited Cosimo before them and put him in prison. A *parlamento* was summoned, and a *balìa* was

\* Yet a little before Giovanni dei Medici's death, Rinaldo wanted him to enter into a plan to reduce the fourteen lower guilds to seven.

† Comp. what von Reumont says of the *catasto* in his *Lorenzo dei Medici*, i., 40 onward (in the German), and see Macchiav., b. iv., (iv., 24).

constituted, or literally a large committee with power to reform the state. The piazza being surrounded by armed men, everything went through without opposition. The *balia* (or men of the *balia*) met several times; at the first meeting Cosimo was banished to Padua; others of his house to other places for various terms, and the Medici were made *grandi*, *i. e.*, incapable of holding office. At another meeting of the same commission, an office, called the eight of the guard, was instituted for the purpose of preventing disturbances of the peace in the city and neighborhood, a measure plainly pointing at the partisans of the Medici.\* Less than a year after Cosimo's banishment a signoria was drawn, all the members of which were favorable to him, the priors as well as the gonfaloniere. His enemies were at a loss what to do, and did nothing to prevent what they feared—his return. A *parlamento* was summoned, a large *balia* or commission was nominated, and, being nearly all of one mind, they not only restored Cosimo, but gratified their political animosities, and provided for the safety of their party far more than the Albizzi party had done. Seventy-six of the citizens were banished for a term of years, from ten downwards, including Rinaldo Albizzi, Palla Strozzi, and other principal citizens. Some were declared incapable of holding office for ten, some for twenty years.† Others were made *grandi*, and thus excluded with their posterity from office. But some time after the quiet produced by this "reform" a law was passed taking away the restrictions imposed on the old nobles or *grandi*, so that entrance was open to them into the offices of the state. Yet this amounted to little, for, to use the words of von Reumont, "the names of the nobles were not put into the bag containing the list of eligible persons, and they lost also those [extraordinary] offices which had been open to them, such as legations and commissions for conducting

\* Cavalcanti, Istor. Flor., b. ix., ch. 8-17. This author gives the names and often the occupation of the men of these *balias*. Some of them belonged to the lowest guilds.

† Cavalcanti, b. x., 10-20.

war, etc. This meant that the haughtiness of the old families was a thorn in the eye of the men of the new family who had put no trust in them." \*

The *balìa* which restored Cosimo was continued for five years, and again for the same period. But the names of those only went into the bag who were either partisans of the Medici or were harmless; for all obnoxious or suspicious persons had been incapacitated to exercise political power for a term of years or for life. At the end of ten years after Cosimo's restoration, in a time of discontent with the reigning policy, another commission or *balìa* was given to two hundred and fifty citizens to reform the state, at which time existing banishments were prolonged, others were added to the list of banished ones, others, two hundred and forty-five in all, were disabled from holding office. Now also, as well as in 1433 just before Cosimo's banishment, and in 1434 just after his restoration, a board of ten persons called *accoppiatori* was created to manage the drawings for magistrates. These persons, in 1444, whose office lasted until a new *squittinio* should take place, received power to select the magistrates. "Thus everything that the people or the *balìa* had done was subject to the revision of those ten" (Capponi, ii., 282), men ready for anything that should be required of them. So miserable and contemptible had the constitution of Florence now become.†

Cosimo and Lorenzo kept their places under the forms of an *effete* constitution dishonestly administered. Piero, Lorenzo's son was unequal to the task of defending the city, and the Medici were expelled for eighteen years in 1494, to be restored by a foreign power.

The estimate of the Medicean state given by F. Guicciardiani in his work "Del Reggimento di Firenze" is on the whole so just that we will introduce a passage from it into

\* Lorenzo, 1., 147.

† The signoria following the restoration of Cosimo was chosen not by lot but by the voice of "an enraged multitude." Cavalcanti, x., 9.

our pages.\* In the dialogue the aged Bernardo del Nero speaks thus : " It would give us little trouble to express in brief what was the nature of the Medicean state, for the truth of what Piero Guicciardini said cannot be denied, that it was a state usurped by means of faction and with force. Or rather, it is necessary to confess that which, through becoming reserve perhaps he was not willing to express, that it was a tyrannical state ; and although the city retained the name, the show and the image of being free, they had control and were masters, since the magistracies were given to whom they pleased, and those who held them obeyed their beck. It is true, and this I know that you will not deny, that their tyrannical rule, compared with that of others, has been mild ; for they were not cruel and bloody, nor rapacious, nor violators of female chastity nor of the honor of other men. They were desirous and eager to augment the power of the city, and did much good and little ill save what they were led into by necessity. They wished to be masters of the state ; but with all the respect for civil order that was possible, and with humanity and moderation. This they did principally from their own natural impulses, for it cannot be denied that they were of good blood and of noble mind. Cosimo and Lorenzo, being prudent, and having around them always a number of wise counsellors from among the citizens, understood that, taking the nature of their government and the condition of the city into view, they could scarcely govern otherwise ; and that every means they might have used of bringing matters under the control of greater violence and of blood,—as we see the course to have been in Perugia and Bologna—would at Florence have destroyed rather than increased their grandeur."

This mild judgment is followed by Piero Capponi's less mild, but not harsh indictments against them, especially against Lorenzo, for interference in administering justice, for improper

\* *Opere inedite*, Flor., 1858, vol. ii. In a recent number of the *Edinburgh Review* this passage is cited, but we had inserted it in our work a year or more before, (in our first edition.)



distribution of public honors, and for faults in respect to the preservation and augmentation of the state's dominion. Under the first count he says that they corrupted justice by recommending their friends to be magistrates and judges. What they did not do directly their friends did. When they were silent, their friends guessed at their will. Especially Lorenzo erred in this respect, by filling the bag in the selection of commercial judges with the names of his dependents.\* Criminal justice, he adds, was far more tampered with in order to screen the friends of the government. The crimes of men of influence were not complained of, for there was little hope of justice. The distribution of public honors was shameful, for unworthy ends, to unworthy persons; and arbitrary imposts on the enemies of the Medicean house were made the means of oppression. Moreover, by means of the *balìa* a great part of the citizens were excluded from office by law, together with their sons and descendants in perpetuity. Public affairs were managed in the interests of the house and not for the benefit of the city.

The liberty of Florence after the expulsion of the Medici in 1494 was short-lived. The main feature of the new constitution was a great council of from eight hundred to one thousand, copied after the government of Venice, composed of persons at least twenty-nine years old, whose ancestors or they themselves had filled one of the three higher offices. The priors and gonfaloniere with their *collegi* continued. A senate of a much smaller number was added, holding office for six months. To the great council pertained the elections and legislation. For holding office, names were proposed in the council; and if accepted by a majority they became eligible. Such was, in its outlines, the constitution approved by Savonarola, and it continued after his death in substance until Piero

\*The *six di mercatanzia*, an old commercial court, to be traced back to a time earlier than 1307. These with a foreigner and with two members of the greater guilds drawn by lot from the bags, constituted the "*ricorsi*," a court of appeals, apparently, in commercial cases. Canestrini's note, Guicciard., op. ined., ii., 37.



Soderini became gonfaloniere for life in 1502. At the same time the old office of podestà, as we have already seen, was abolished. Already other offices of the older time had expired or become empty names.

In 1512 this constitution was overthrown, the gonfaloniere was banished for life, and the dukedom of Florence was founded, to be ruled over by one of the Medicean family. It was called the grand duchy of Tuscany in 1569.

### § 192.

We have devoted what may seem an unduly large space to the constitution of Florence, but such was the complication of external or internal causes at work in the development of this polity, that much more might be added if we would fully explain every change and show its historical connections. Besides this, Florence has had such an illustrious place in the history of human progress that few modern polities are so well worthy of being studied. Under what form ought the government of Florence to be classed? M. Thiers regards it as the most democratic in ancient or in modern times.\* Is there any justice in this opinion? We cannot see how a polity can be called democratic where the nobles and patricians wielded the principal power until the institution of the *primo popolo*, and even until the government of the upper guilds in 1282. After this, while the wealthy class was contending against the *grandi*, and finally overcame them, the lower guilds had no share in power or office until the middle of the fourteenth century. And when, finally, after 1378, the lower guilds gained something like their numerical importance for a time, their supremacy was short-lived; a faction of *ottimati* governed the state until they were obliged to give it over to another set of men more popular in the relations of the governing family to the people, but equally oligarchic; nay, more verging towards tyranny. There seems to have been but little democracy in all this.

Estimate of Floren-  
tine constitution.

\* Capponi, preface to vol. I.

Again, the methods and theory of government were not those of a democracy. The *parlamento* was indeed in theory an assembly of the people, and was the last resort for the enactment of laws and for reforms in the constitutions. But the *parlamento*, when we know much of its action, was an assemblage of persons in the public piazza, with the understanding beforehand of carrying out the views of a faction. Armed men were on hand to keep down opposition. The *balia* that restored Cosimo de' Medici was appointed by about three hundred and fifty citizens, all of whom but four were in favor of his restoration. No enemy of the project would have dared to gainsay what this packed crowd determined to have done. The *balias* had certainly nothing aristocratical in them from 1393 onward. The lot contained a democratical element; but the registration and the bags looked just the other way.

Florence had not only a constitution leaning towards aristocracy and oligarchy, but an exceedingly ill-balanced one. The methods at different times adopted to get rid of obnoxious enemies,—as by wholesale banishments and confiscations, by temporary relegation, by “making men sit” as the expression was or disqualifying them for office (*mettere a sedere*), by conferring on them the condition of a *grande* or even an *arcigrande*, by *ammonizione*, by depriving whole families of civic rights,—show what a fierce state of parties, and what untold miseries the polity allowed. The ostracisms and liturgies of Athens were nothing to the terrible ruin of families, the exile and the executions for political offences, that stain the history of Florence. When the Ghibellines were driven away, the Guelphs divided into two factions just as bitter; and if the Bianchi had triumphed, the Neri would, without question, have felt their vengeance.

Yet there is another side to the picture. Through all this time of strife, industry prospered; commerce went abroad far beyond the Alps; bankers lent their funds to crusaders and to kings; art produced some of the choicest of modern works; poetry was represented by the greatest of mediæval writers. Can there be a question that the intensity of politi-

cal life gave a spring to all the forms of human activity? The strife, arising out of external relations at first, was thus not an unmixed evil.

### § 193.

It may not be without advantage, if, at this point, we sum up, as briefly as possible, the leading particulars relative to aristocracy; whether it appears as a governing class in the state with recognized political rights, or occupies more indefinite ground as a group of families in possession of honors, and of the means of defending their position against attacks, without having a recognized constitutional standing.

The origin of a species of aristocracy which is among the very oldest, is the hereditary division and separation of employments which we call caste. The military class and the teachers of religion, if they become hereditary, must engross the power of society in their hands, as well the intelligence and power of combination as the force. If both are strong, and if they co-operate, they form an upper class or upper classes which are strong in themselves, and strong by the superadded help of religious obligations.

There must have been a time when these classes began to exist, and a time during which they were comparatively weak. The tendency to transmit everything acquired by personal exertions in a hereditary line and, in the case of the military class, the advantages furnished by their superior means of acquisition would soon place them above those who were once their equals. The rise of the Brahmin caste, which is unknown to the earlier vedas, is due to the copious liturgies, to the almost magical power attributed to prayer, and the necessity which sprang up, at length, of a special education for understanding the sacred books—causes which shut out the greater part of the people from an active, independent part in worship. Whether the tribes at Athens of prehistorical origin, which continued until the time of Clisthenes (510 B.C.), and point by their names to diversity of occupation, two of which were that of hoplites or guards, and perhaps that

of priests, were caste-like divisions of the people may well be doubted. The small importance of the priests afterwards, together with the absence of priestly incorporations, and, indeed, of any foundation for castes whatever, make such an early form of society in the Athenian state improbable. The institution of the Druids was a similar division in the direction of caste.

Another common origin of a nobility is conquest, whether of one cognate tribe by another, or of a foreign people by a conquering soldiery. With a conquest comes assignation of lands, the old tenants being retained on the soil as laborers, or allowed to keep a part of their property. All the conquests by Germanic tribes in Roman Europe brought acquisitions of lands, at least to the leaders; and but for this the feudal system could not have arisen. Among the Franks at the time of their settlements in Gaul no nobility can be traced, unless the king's companions, the *antrustiones*, can be called such. But in process of time a feudal nobility arose in France, through gifts of land and local governments, which was one of the most splendid in Europe.

The position of such landholders, with the tradition in families of the primitive occupation of their martial ancestors, the sports of hunting, and the ennui of a life on their estates, keep up the martial feeling, and so long as they are true to their origin, and a field is open, they preserve their power.

An illustrious birth is another source of aristocracy—that is, a birth which is to be traced back to heroic ancestors, or is mythically connected with the earliest fables of the race. This, indeed, of itself, without the possession of land or of other sources of supply, will avail nothing; but the respect paid to historic ancestry enables a family, even when driven into exile, to stand on a level with the foremost, and to use the means for securing a permanent position. It is remarkable in the early traditions of Attica how illustrious exiles were welcomed there, and even rose to fill the kingly office. In modern Europe, especially in Austria, numbers of foreigners have occupied important places among the nobility on



account of their condition at home, and owing to services rendered to their adopted countries.

Wealth acquired by commerce or manufactures is another source of hereditary aristocracy. We have seen how, in trading states like Carthage and Venice, the upper class is thus for the most part constituted, although there may be a sprinkling of noble families in younger branches among them. This may be an origin of a town "patriciate," but rarely are such families as have grown rich by trade admitted to an equality with the old nobility of a country. A few instances may be cited like the Fuggers of Germany, the Medicis of Florence, and a number of others, and a few in England in modern times; but in general the spirit of a hereditary landholding aristocracy looks down on trade and manufactures as mean employments.

We can only point to other sources of national aristocracy which play a subordinate part, as the favor of kings to courtiers not noble at first, distinction at the bar, in military service, even in literature. England, which has in some respects ways of replenishing its aristocracy peculiar to itself, will afford many illustrations of such ennoblement.

By no means all nations or races have a nobility proper, still less a nobility with titles, an aristocratic hierarchy. At the first all distinction was personal or grounded on what an ancestor had done; next was distinction arising from larger possessions; then titles were introduced. The Jews had no nobility proper, they were as a whole people a kingdom of priests, a holy nation, and brethren with equal rights, religious and civil. The small influence of the high-priest and upper priests show that the hierarchy had no great political power. The inalienability and reversibility of lands belonging to a family would have prevented an accumulation of that kind of property in the same hands for a long period, if the law had been strictly observed. But as we have in the scriptures a woe denounced on those who join field to field, and a wealthy class appears by the side of the poor, the institutions must have become more or less disregarded. And the frequent men-



tion of princes in the Scriptures shows that a superior class—although not a hereditary one, but rather a class of officers civil and military—existed, as indeed was inevitable. On the whole, however, nothing shows that there was a hereditary Hebrew nobility, nor an upper class to which any one might not attain.

The Romans had a class with special privileges by birth, heads of gentes and separated off with their gentes by civil and religious privileges from new-comers. Yet, at length, this patrician class yields to a nobility of the best families, who managed to keep office and its opportunities in their hands. It was not until the fourth century of our era that titles, on account of public employments, laid a kind of foundation for the nobility of the holders of office.

In other nations hereditary enjoyment of office or of certain offices arose during the history of a people,  
Titles of nobility. of which instances have been given already.

A nobility with titles, such as we now find all over Europe, show their origin by these very titles. They were subordinates of the suzerains in the administration, in the counties (graf, comes, vicecomes, caldorman, etc.), or on the marches (marchio, markgraf, marquis), or at the palace where the king's justice was administered (comes palatii, pfalzgraf, palgrave), or as leaders of an army and governors of a province (dux, duke, herzog), and so on. These titles serve to prolong a distinction which would not otherwise be so much felt. The nobleman would, but for them, stand nearly on a level with other wealthy owners of the soil.

It is natural in monarchies and aristocracies that the leading class should have not only a leading share in legislation, but also that they should form a legislative body by themselves. The governments of the middle ages were chiefly constructed on the principle of separate houses of nobles, clergy, burghers, and, though rarely, peasants.

This share in legislation brings us to the efficiency of an aristocracy in different polities. In a despotism, the principle of the polity requires equality of subordination to the ruler and his advisers. But a landed  
Efficiency of a noble class.

aristocracy is a breakwater against despotism, even if there is no middle class as yet in existence to join them. If they are alone, they cannot generally make head against a tyrannical government; but if there is a people, this may be within the power of the two classes united. In a limited or mixed monarchy a nobility has been thought to be a kind of mediating power between the throne and the common mass of people. There is some truth in this, where the upper class keeps its independence and is sure of its position against democratic violence. The barons of England were not content with wresting from King John privileges for themselves, but included all free Englishmen; and the barons in the times of Henry III. called the representatives of shires with those of towns, to parliament. There has always been a party in the nobility against rotten boroughs, and in favor of extending suffrage. But in other countries it took a great while to approach the position where a large number of the English nobility stood even in the fourteenth century.

An aristocracy in a republic as it is called, that is, where there is nothing higher than they are, has almost always been a harsh and haughty, or a divided order. Nowhere has aristocracy, whether titled or untitled, coalesced with a strong democracy; but the two orders have quarrelled and the aristocracy has been divided within itself, one part holding with the people. The result was, as we saw in Rome, in the Greek and the Italian aristocracies, a tyranny or a democracy predominant. If the pride of a governing order would permit them to bring within the circle of their privileges all among the commons who distinguished themselves by great achievements wealth or talents; they might keep their place, although they might have to modify their spirit. But a government of an aristocracy is so incapable of union, so unequal to suit itself to the effects of changes in property which time brings with it, so narrow often in the views which circulate among its members; that it seems, for more reasons than one, as we have had occasion to say before, to be the weakest and most uncertain of all governments.

The British aristocracy has been made to fit into the system of polity in a very wise manner. In the first place, there is no broad line separating between the nobility and the common people. The knights and baronets, and the higher aristocracy, have the right of marrying into families of commoners, against which the German laws of *ebenbürtigkeit* draw a strict line, and the younger branches of titled families are finally merged in the people; while yet there is a certain healthy stimulus from the consciousness of a respectable birth, preventing them from leading a dependent or a listless life. These are so many pathways over a chasm which the aristocracies in other countries have not been willing, if able, to bridge. Then, again, the British system is a wise one, as far as relates to supplying new recruits to the aristocracy and the peerage. Without being intended as a bribe, this way of creating new peers secures the support of the government by new men representing a fresh class in society. The old families must continually become fewer, not only for the reasons which diminish the number of families of an average respectability on the male or on both sides, but because their position supplies them with few motives to put a check on self-indulgence. They have in general, also, more stagnation of intellect than families under the influence of a desire to rise. Probably a peerage descending in the male line, if unreplenished, would in a few centuries almost run out.

Whether, in the future, hereditary aristocracies can maintain themselves, when so many men of intelligence and wealth do not share their privileges, is very doubtful. And it is certain that the feeling of equality of rights, running, as it is apt to do from the sphere of private into that of political rights, will oppose all institutions which give a few men a special and exceptional power—not as representatives, but as a privileged hereditary class. But of this we intend to speak under the head of revolutions in government. Whether the place of a hereditary peerage can be supplied by a house of illustrious men, selected on account of their wisdom or distinguished services, without reference to birth, and either elected by the

country or named by some nominating power, or in part, at least, open to certain men who have filled high stations, is discussed in another place. (§ 223.)

This, however, seems certain, that no laws which keep landed property in a family, or restrict marriage between the orders of society can long accomplish the end for which they are enacted—that is, the end of keeping their blood pure and preventing such property from passing out of their hands. When a country feels that such institutions are intended to prevent the natural influences of wealth acquired by industry and of superior untitled intelligence; when they are regarded as a support of undeserved hereditary rights, which in themselves imply merit and intelligence, the fall of a peerage with legislative rights is not far off. Whether the nobility fall or not, its control in politics must cease.

Whether a municipal town under the supremacy of national law, yet having some self-government, may not have an upper class with somewhat more of privilege than the body of the inhabitants, without falling into the evils to which small states, like many Greek states, Milan, Florence, and other city-states have been subject, is a question of some interest. Certain it is that those towns of Europe, in the middle ages, which contained such a class and yet were subject to a national or other considerable feudal power, were not in a condition to fall into such evils. And yet, in their origin and through their early growth, they had the same general development with Milan, Florence, and many Italian cities. It is easy to see from the sketch of the Florentine constitution how the larger part of the miseries and faults of the republic grew out of its practical independence. But we cannot take up the consideration of such towns and their civil order until we come to treat of municipal government together with centralization and distribution of power by themselves.

## CHAPTER VI.

### DEMOCRACY AND DEMOCRACIES.

#### § 194.

WE understand by democracy the polity in which the people or community, as an organized whole, has the chief power in its hands, and can through its agents manage the government for what seems to it to be its welfare. The doctrine that all power is ultimately derived from the community may be consistent with the choice of a life-long tyrant or a hereditary line of kings; but the transfer of power to an authority like either of these destroys the democracy itself, even if the tyrant or the king administers affairs for the general good and not for his own separate interests. On the other hand, when there exists a clearly defined democracy, the welfare of the lower class, or of a party or of a section of the country may be aimed at by the government, to the injury of the country as a whole, without putting an end to the democracy. The form determines its nature, the spirit its quality.

Again, we may doubt whether a polity deserves the name of a democracy, when a considerable number of citizens are excluded from political rights. One case of this kind we have considered—that where a large body of slaves exists and the active citizens do not amount to half their number. The polity would be seriously affected if they should be set free and receive civic rights. It would then be a democracy indeed, but would it be such if they remained in servitude? The ancients, where slaves were found under every form of polity, did not count them in at all, as changing the forms of states, any more than children and women. They were in all polities a *caput mortuum*, and did not affect the differences between one polity and another.



It may be asked again whether that be a democracy where restrictions on the right of suffrage or the right of holding office confine the actual control of affairs to a few hands. Here we refer to political restrictions, because there may be, there always is, a very great majority of citizens who have no chance in their whole life of holding office. In regard to suffrage, it may be said that the more it excludes from office or from the power of choosing others, the more it approaches to aristocracy ; but so long as the qualification for active citizenship can be overcome by thrift or intelligence, and actually excludes a few of the whole only, so long the democracy is unaffected either in its form or its spirit : in its form, because no *permanent* line of birth or of any other personal property is drawn ; in its spirit, because the intelligent class of society can and must perceive that what is best for all is best for them ; while a great mass of voters without property or intelligence can only be led by demagogues who regard the true interests of neither portion of the community.

And hence, among the variety of forms that may be conceived of, we may doubt whether certain ones belong to aristocracies or to democracies ; we may call a polity a very mild type of aristocracy, or a democracy with aristocratic leanings. But this is inevitable ; for while in the material world nature has definite, almost unchangeable species, in the moral and political spheres there is no such fixity.

### § 195.

The size of a democratic state has nothing to do with its nature ; and yet, in order that a large one may be true to the idea, the principle of representation must be introduced into it, and thus a most important difference arises between two types of this polity. The early states being small, and those around the Mediterranean being gathered chiefly within walls for the purposes of defence, the democracies, when their era came, had no need of a representative system. Their size made the meeting of the citizens in assemblies an easy thing, and the political habits thus

Small and large democratic states.

generated would have found no satisfaction in entrusting others with the power of ultimate decision on political questions. There is a good deal to be said in favor of the education furnished by the old assemblies of the people, by their active co-operation in politics and judicial affairs, by their responsibility in person for the public welfare, by their training through the eye and the ear on the *pnux* and in the *dicastery*, rather than by hearing meagre reports of what persons supposed to be wiser than they had done for them. The persons who could listen with pleasure to the orations of Demosthenes before the people, or to his and the other leading Athenian orations in public and private suits,—they for whom the compact pleas of *Isæus* on questions of inheritance were written, must have had an education superior in some important respects to any which modern times afford. I ask myself, while writing these words in a city of a free republic, where there are some twelve thousand qualified voters, whether our modern system—which entrusts public business to others—trains up men as shrewd, as interested in public affairs, as capable of entering into complicated arguments on cases of law, as the Athenians seem to have been; and the answer must be in the negative. And yet there are probably three times as many able to read and write in this modern city of smaller size as there were among the twenty thousand citizens of Athens. The advantages then are not all on one side. In the change from a city-state to a commonwealth of great extent, we sacrifice something while we gain much. What we sacrifice has already been hinted at. We lose our interest in political life and a certain active patriotism which loves the state for itself and not for its benefits; we lose to a considerable extent our sense of responsibility as citizens; we lose our political training; we lose our relative value as political units. What is a vote worth, subjectively considered, when it is one of a million, compared to a vote in a little republic of ten or twenty thousand citizens. The mass of our political equals contracts the bulk of each of us in a great democracy; hence, multitudes will not go to the polls

in this country, because a vote more or less among so many will be of no account.

It ought to be said, however, that these advantages of unrepresented democracies were counterbalanced by great evils. In the first place, slaves and citizens seemed both to be necessary in the ancient system. The greater part of the industrial classes in a city democracy must have been almost exclusively devoted to labors which gave no training to the mind. Out of five men addicted to labor, four were incapacitated to exercise political rights; the other one-fifth comprehended the intelligence and breadth of view of the whole city. How to secure a government against immense masses of ignorant citizens would have been a great—nay, an unsolvable problem. Further, the close contiguity of men in a city-state gave room for combinations and conspiracies, which might be aided from abroad; to clubs for mutual assistance in getting office, to factions leading to tyranny or intestine war. And again, the intense excitements of the assembly were often such as we have no conception of in modern times; the nearest approach to them is found in municipal assemblies where taxes are to be voted, or in elections for municipal officers, when there are strong parties formed for some temporary purpose. These, however, are nothing compared with the political agitations of ancient city-states. On no arena in modern states can oratory excite the people to such a degree as it did in the little ancient republic. Nowhere are examples to be found of suspicion, hatred, lawlessness so extreme.

With the strong interest in the state and in political life, the desire would grow to have a share in public office, at least in these forms of government where office was open to all. In a large state there will be office-seekers, but the ratio of places to citizens is much less than in a small one. It is this desire that especially recommended the lot at Athens and in other extreme democracies, as Aristotle remarks; and this may have led to the great multiplication of offices for which Athens was remarkable.

Again, the sway of the demagogue in city-states was somewhat different from the influence of the same persons in a democracy of large extent, and was also somewhat greater. In the city-democracy it was more a personal power, sometimes so great in the worst times that tyrants grew out of this class. Demagogues arise, says Aristotle (Pol., vi., or iv., 4, § 4), "when the resolutions of the *demus* (*i. e.*, the *psephismata*) have force and not the law. And this is owing to the demagogues who do not appear in democracies where the law reigns, but where the best citizens are in authority.—The *demus*, being a monarch, seeks to play the monarch when it is not governed by law, and becomes despotical, so that flatterers are held in honor. And such a people is analogous to tyranny among the kinds of monarchies; both also have the same character, both are despotical over the better class." He then goes on to remark on the resemblance between the flatterer and the demagogue, and accounts for the fact that *psephismata* and not laws are in force in demagogical republics, by the demagogues becoming great when the *demus* has power, and when they (the demagogues) shape the opinions of the people, referring everything to them in name, but in reality telling them what to do.

In the ancient city-states the demagogues were numerous, and as each sought to have the ear of the lower people, they came into collision. Their collisions reached their head in accusations of each other before the assembly or before the courts. This, in fact, was the safety of the people in particular instances, but the institutions kept the habit of demagoguery alive. In large states democratically governed, the demagogue, in order that he may gain his ends, has need to combine with others; the sphere is too large for any one to fill by mere personal power. The demagogues in modern municipalities resemble those described by Aristotle, and may be quite as mischievous; but even there combinations are necessary. Then again, the modern constitutions are somewhat of an obstacle in the demagogues' ways. All agree that



law must govern, and cannot be made to suit the temporary will of the people. And as to the making of the laws themselves, there is less free room for demagogues to move in, since the representative system, (as well as written constitutions) has put difficulties in their way, as we shall presently see.

### § 196.

There are three moderating principles in democratic states as they are constituted in modern times : a constitution, a representative system, and sometimes a limitation of the suffrage. The first and the last of these may be introduced into the framework of a city democracy ; but the safeguards against change there are few, and those arising from extent of territory and difference of local interests are wanting. The last of the three, or a limited suffrage, few city-states, without a strong oligarchy, could long retain ; for the people, being the majority in number and able to unite their forces, could gain political power much more easily than when they are dispersed over a wide country.

1. A constitution contains the most important principles of government, and defines individual rights with the expressed view of guarding them against change. They are generally guarded in such a way that, unlike ordinary laws, the will of an existing majority is not competent to alter them. It was a safeguard of a framework of government that, with the other laws, it was attributed to some mythic law-giver, or had the sanction of divine authority, as of the Delphic oracle in Greece ; but when a change of social habits and a loss of faith in the religion of the country came on, this awe ceased. The feeling of power, when the act follows the will at once, is uncontrollable. Athens was by no means one of the worst democracies, yet the people on one famous occasion, under an oligarchic influence, cried out that " it was outrageous if the *demos* should not be allowed to do what it pleased." And the party that wished law



and righteousness\* to have its course was overawed and defeated.

The forms in the way of altering a constitution are the best sedative for an over-excited state of the popular mind. It may be said, indeed, that two-thirds, or any other number which admits the possibility of change, is unjust, as blocking the action of a people by a small minority. It is remarkable, however, how small a weight this complaint has in our country, where the rights of the majority, and the rights of all to suffrage, are generally admitted. No one among us, unless a fanatic, believes in any right to alter the constitution of a state or the country whenever a majority demand it. On the other hand, the reasons which recommend a constitution make it necessary that a certain permanence should be given to this instrument beyond that which ordinary laws or acts need, because all calculations for the future depend on such stability. It is, therefore, an act of self-preservation for a society to make a constitution somewhat difficult to alter. The city-states felt this, yet had no effectual provision against change within their reach.

2. The representative system. In addition to the remarks made in another place, we say here that the object of a deliberative law-making assembling is to find out first of all what is the highest good, within the reach of political measures, for a whole community, and not what will suit the greatest number of constituents. The delegates are sent to advise with one another, and are not, in the proper sense, delegates of parts or of parties, but belong all to the whole country; so that, if they were chosen by a small aristocracy, it would be a crime to consult the interests of that aristocracy rather than the wants of the whole community. It is the whole, the organized community, the political body, which appears in the halls of legislatures. But as the political body consists of parts, each of them having interests

\* I write this, aware what an eminent historian has said to the contrary.

and wants of its own, which may not be inconsistent with those of the greater whole, here a new duty comes before the representative assembly, and one just as binding on one part or one interest of a country as on another. Of course, interests may clash, and men will be one-sided and selfish ; but there is no doubt what the function of the legislator is. Just at this point appears—let us be allowed to add—one superiority of this system over that of city communities. When the private person, unlettered perhaps, and warped by others, goes to the assembly, he has an excess of the feeling of power, but a defect of the sense of responsibility, since he acts alone for himself. But the representative acts in trust for others, who have a right to expect that he will do what they ought to do if they could be in a mass in his stead. This, therefore, like all other delegation, calls forth the moral feelings—especially the value of esteem for fidelity—more than most *personal* transactions of a similar kind. Many a merchant will impose on a customer without scruple, on the ground that every one must judge of goods for himself, who would feel that a crime would be committed by a clerk who should thus practice imposition on an employer.

The forms and rules of debate in modern legislative assemblies could never be observed in assemblies where the whole body of citizens met together. A session of ten days consecutively would be impossible in a city-state, and would shut out the industrious classes, unless they were paid for their attendance; in which case the lower class, only who could make nothing more by ordinary work than by their pay at the ecclesia, would be present. Even they would be tired out by sessions of a number of days together. But representatives can meet almost daily for half a year, and the various kinds of business can be maturing for weeks and months in the rooms of committees.

It is not to be denied, however, that as representatives are left very much to themselves within a constitution, they can abuse great trusts. In general their temptation is to follow the wishes of their constituents timidly and unrighteously. A

new election, the attacks of newspapers in the interests of parties, any fear of loss of influence, are sufficient motives for their support of a bad measure or law. But there have not been wanting also cases in the history of representative governments where they have showed themselves open to corrupt motives; and within the last few years in the United States, instances of this kind have either been frequent, or at least suspicion of bribery within legislative halls has been very general and seemingly well founded. The modern occasions for receiving bribes have been connected with the chartering of great companies, whose vast business will, it is thought, enable them to be at great expense in starting well. The greater the enterprise; if it requires, like means of locomotion, or like any companies founded on a principle of monopoly, or like subsidies given for public purposes, some legislative sanction; the more dangerous is it to a democratic community. In fact, this special danger, which is peculiarly a modern one, appears in all communities, but most in those where the representatives are not men of substance belonging to the upper class of the community. And the hope of getting a share in the gains acquired by knavish politicians may be a motive on the part of some men for seeking places in the legislatures. They go, it is to be feared, wishing to be bribed, not intending to vote against their convictions, but to make gain out of their convictions, like many members of parliament in the time of Charles II. of England.

The principal remedy for such baseness within the political sphere is some restriction on the power of special legislation—for conviction of bribery is and always was exceedingly difficult. It is significant of the feeling in this country, that in the latest revisions of state constitutions, the power, formerly lodged in the legislatures, of giving special charters, and the general power of special legislation are in great measure taken away. Thus, in the new constitution of Illinois, made and adopted in 1870, which seems to have led the way in confining legislative power within narrower limits, there are as many as twenty-five cases enumerated, in which the general

assembly is prohibited from passing any local or special laws. Among these are "granting to any corporation, association, or individual, the right to lay down railroad tracks, of amending existing charters for such purposes, and granting any special or exclusive privilege, immunity, or franchise whatever;" and in all cases where a general law can be made applicable, no special law, it is declared, shall be enacted (art. iv., sec. 22). Other restrictions—such as that upon the rate of taxes which the county authorities are allowed to assess, upon the competence of the general assembly itself to create banks without the consent of the people by a general vote, or to create corporations by special laws—are dictated, it is probable, at once by the desire of throwing business out of a legislature which could be provided for in some other way, and by that of avoiding all that is called lobbying and private solicitation of members of that body. Similar provisions are introduced into the new constitutions since 1870, discussed in the states of Pennsylvania, Ohio, and Missouri. This exhibits to us the clear conviction that restrictions are needed on legislative as well as on executive and on municipal power. And this conviction seems to have arisen out of the experience of the dangerous and unsatisfactory character of much of the special legislation of the past in this country—a legislature, more than any other public body, being exposed to corrupt or temporary or local influences, and exposing those who are concerned in it to the evil arts of interested persons.

Of course the representatives are accountable for the arts and fraud which they may themselves have used in securing their places. In the ancient city-states attempts to procure office by fraud were common enough. Modern democracies suffer from this source of corruption no more than modern aristocracies, and perhaps less.

3. Qualifications for suffrage. In the period when aristocratical and democratical elements were contending in the ancient city-states, the contest was manifested by various devices to restrict the suffrage, or

Limitation of suffrage.



to extend it, or to make it at least less efficient. Aristotle mentions some of these devices (Pol., vi. or iv., 10, § 5 and onw.). Many, says he, "even of those who aim to make politics aristocratic, commit an error not only in giving the wealthy more than their share, but also in deceiving the *plebs*; for in time it is necessary that out of good falsehoods evil truth should grow, since the ambitious desires of the rich do more harm than those of the people." He then speaks of five sophistical artifices in dealing with the people, having reference to the assembly, the magistrates, the courts of justice, the wearing of heavy armor, and the exercises in the gymnasia. The first ruse, that in regard to the assembly, was to impose a fine for non-attendance, either on the rich alone, or a greater fine on them than on others. Next it was made easy for the poor to be excused from office by a sworn statement of the inconvenience (ἐξόμνησαι), but for the other class it continued difficult. "In respect to serving in the dicasteries, a fine was imposed in the same way on the wealthy for failure in this duty, but the poor were free to perform it or not; or a large fine was imposed on the former and a small fine on the latter, as was the case in the laws of Charondas. In some places, all who got themselves registered had a right to participate in the duties of the assembly and of the courts, and heavy fines were levied upon those who after registration failed to do their duties in either of these places, it being the object that the fine might keep citizens from being registered, and that when not registered they might be kept from the ecclesia and the dicasteries." Similar was the legislation in regard to owning heavy armor, which allowed the poor not to own it and fined the rich if they did not; and which fined the latter for not sharing in gymnastic exercises, while the poor could be excused from them. Such laws acted unequally on the two classes, with the evident intention of keeping the one away from political life and of unfitting them for military duties, in order that they might not exercise their rights, and also that the others might be active citizens and soldiers. In democracies, he adds, the sophisms



—or devices to throw the greater weight of power upon one class rather than on the other—are of just the contrary kind : the less wealthy get pay for their attendance in the ecclesia and the courts of justice, while the rich stay away without being fined. Hence, it is evident that, if there were a due mixture of political expedients, the rich ought to be fined for staying away and the poor paid for coming ; all would then have an active share in the government, while, where the devices spoken of are used, only one part has it in their hands.

When there was no balancing or controlling oligarchic principle, especially where such a principle had been overcome after a struggle or a haughty abuse of power, the suffrage was extended to all free native citizens and to their sons from an early age. Universal suffrage was a thing necessary for a city-state when democracy had become dominant, that is, where there was no class in other respects privileged

### § 197.

Of the Roman constitution it is enough here to say that the plan of classes, with centuries containing Democratic institutions at Rome. an unequal number of voters, had the effect that the centuries of the higher classes or the more wealthy citizens, although casting a smaller number of votes, if unanimous, could always elect their candidate, since a majority not of votes, but of centuries, decided. And as the centuries of the higher classes were called first, it might be that an election was certain without calling for the suffrages of the lower classes, which must have lessened the interest of the more humble citizens in the elections

The principle which here prevailed, of determining elections by the majority of centuries within classes, entered into the *reformed* comitia in such a shape as to unite the voting by tribes and by centuries together. There remained still the centuries of equites, although they did not vote first, and every one of the five classes had thirty-five centuries of *jun-*

*iores* and thirty-five of *seniores*. The census still determined the class in which each person should be enregistered, and the members in the upper classes, it is altogether probable, were much fewer than those in the following ones. Hence, still, a preponderance was given to the wealthier citizens; but this revised division of the citizens leaned more towards democracy than the older constitution. Down to the year 442 of the city (312 B. C.), none but freeholders could enjoy the right of suffrage. At that time the censor Appius Claudius arbitrarily admitted persons who had movable property and no land, into any tribe they might prefer, and into the century suited to their amount of property. A few years afterwards, another censor, Fabius Rullianus, assigned "all who had no land, and those freedmen possessed of land whose property was valued at less than thirty thousand *sestercies* [or about one thousand four hundred and sixty-one dollars], into the four city tribes which were now made to rank not as the first, but as the last." In general, by the reforms of these years, "provision was made for the preponderance of the freeholders in the comitia of the *tribes*, while in the *comitia centuriata*, in which, from the decided preference given to the wealthy, few measures of precaution sufficed—the freedmen could do no harm." \* In the later reform, of which we have spoken already, and which belongs probably to the early part of the sixth century of the city (513=241 B. C.), practically the change affected only voting for censors, prætors, and consuls, and the question of declaring war; while the other elections, proposals of laws, and criminal charges, were brought before the *comitia tributa*, where the working of the political machine was more easy. But the control of the higher classes or more highly assessed persons was diminished, as far as voting in the comitia of the tribes was concerned, by the fact that there was an equality within the tribe for the citizens of free birth, whatever might be their census. "The democratic, but not demagogic ten-

\* Mommsen, *Hist. of R.*, i., 397, transl.

dency of this reform of the sixth century, appears in the circumstance that the proper supports of every really revolutionary party, the proletariat and the freedmen, still continued as before to hold an inferior position in the centuries as well as in the tribes." Yet from this time is to be dated the existence \* of an inferior class and of demagogues at Rome, and in the next centuries appears full-grown the practice of *ambitus*, against which a multitude of laws contended in vain.

### § 198.

Rome here represents the tendency downward of an aristocracy, or rather an oligarchy containing a democratic element. In the large modern democracies the progress of things is from restricted towards universal suffrage. We must here make a dividing line between the time when the right of suffrage was considered to be granted by the community to those who would be likely to use it in consistency with the public welfare, and as a trust committed to such as had intelligence and integrity enough to vote for good magistrates,—between such times, when the practical view prevailed, and the more recent times, when voting was considered to be a right of every grown-up male person, when the right of suffrage and the right of citizenship were co-extensive, and both were deduced from the rights of man. The French democratic constitutions represent this feeling of the equal political rights of men as formed under the influence of Rousseau's doctrines, but never removed the inconsistency of not admitting the female sex to the same privilege or natural right. The constitution of 1793 declares every man born and living in France, of twenty-one years of age, etc., to be a citizen, and every citizen to have the right of taking part in legislation and of appointing his representatives or agents. Population is the only basis of national representation. In the constitution of the republic in 1848, on the downfall of the Orleans-Bourbon dynasty, it is declared

Tendencies in modern democracies.

\* Mommsen, u. s., ii., 421.

that population is the basis of election, that suffrage is direct and universal, and the act of voting is to be by secret ballot ; and that all Frenchmen twenty-one years of age, and in the enjoyment of their civil and political rights, are electors, although without property of any kind. This constitution in the main was well suited to introduce the empire.

199.

The English colonies in America brought no abstractions with them, but only those practical safeguards States of American Union. which, as sprung from the Anglican stock, they had learned from their very infancy to value. Although equal among themselves, and thus destined to found democracies, they had assignments of land made to them and associated to a great extent a freehold estate with full citizenship. I believe that in all the original thirteen colonies no one but an owner of land could have the right of suffrage. But a change came on. At and after the revolution which separated the colonies from Great Britain, moral and political theories began to be current, such as "the rights of man," the equality of men in the state, while at the same time the number of such as had no property or no landed property, and a growing hatred of privilege, increased ; and it came to be regarded as an odious thing to make political differences between those who otherwise had common rights. Indeed, the common notion of citizenship involved the right of suffrage. All the new states made suffrage universal, all the old changed their constitutions in the same direction, and, so far as I am informed, no states now place any restrictions on suffrage, other than residence for a certain period, or naturalization, except two—Massachusetts and Connecticut, where ability to read must be made evident before full citizenship is conceded.

The constitution of the United States has properly nothing to do with qualifications for suffrage, but a recent amendment to that instrument does encourage the extension of suffrage to the last degree. I refer to Article XIV., § 2, which was dictated by the fear that colored persons would be kept from



the enjoyment of the franchise in the states where they were numerous. It is enacted, in the passage referred to, that "when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in congress, the executive or judiciary officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age and citizens of the United States, or in any way abridged except for participation in rebellion or other crime; the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state."

There was probably no other way of protecting the colored race from discriminating laws in favor of the whites. And it was still competent for every state to introduce restrictions on suffrage to any extent into its constitution, if they should affect equally all colors and conditions. Yet after this amendment, to abridge suffrage by any rule affecting blacks and whites both would exclude from the polls multitudes of the latter, and would reduce the representation in congress materially in the case of those states where slavery before the late war was most prevalent.

### § 200.

Restrictions on eligibility to office are endured far more readily by the democratic spirit than in the matter of suffrage; and some of them, such as a maturer age than is necessary for the electoral franchise, are so very reasonable that there may be a general acquiescence in them. So nativity in the republic may be insisted upon by the citizens who have that qualification, as setting aside foreign-born citizens of whom they feel jealous. But the possession of a certain amount of property, in order to represent a constituency or to fill a public office is not at all in accordance with the democratic spirit.

Eligibility to office.



Enough has been said to show that a system of representation in a considerable territory is a preservative against some of the evils to which city-states are liable. And for the same reason that large territories under democratic rule are more moderate and conservative than little republics, it is evident that the free landholders in a large democratic state are less innovating, less inclined to sudden excitements than the people of large cities. Representation, however, has evils of its own, which we will presently consider. At present we ask, what were some of the evidences of extreme democracy in the ancient city-states, and whether they can appear in the modern system? Since the essential notion in democracy is that all, rich and poor, have equal political as well as civil rights, and the rich form the minority; the government must be in the hands of the lower classes, if they can be made to combine together. (Comp. *Aristot., Pol., vi. or iv., 4, § 2.*) This can be effected by the modern demagogue as well as by the ancient one, for the press and the public gathering take the place in some degree of the city assembly. It is not easy, however, in modern times, outside of large towns, to make the poor believe that the rich are their enemies, nor do we find the strifes and suspicions of classes to prevail in modern times in democracies more than in other forms of government. It is the condition of a country as it respects wages, population, and the means of rising in the world, and as it respects the sway of moral motives looking towards industry and sobriety, rather than its form of government, that produce restlessness and the spirit of revolution in the more ignorant classes, or the opposite temper. Nearly all of this spirit which has shown itself in the United States proceeded first from foreign workmen, and is fomented by persons of this class. And so far as this spirit is supported by communistic and socialistic principles, it is far from being democratic; for it is the spirit which brings the individual under the yoke of others, instead of giving him the largest liberty.

The extreme democratic spirit, like the despotic, is the

substitution of will for law, and thus all constitutional limitations are so many curbs to its hasty action. But the will of the individual cannot be made the rule for others, unless he persuades them that he knows what is for their interest better than they do. This is the office of the demagogue, who is as necessary in extreme democracy as tyrants are in the degeneracy of states or where the people are all ignorant. The demagogue may be patriotic, he may have broad views; but his essential character is to possess the art of pleasing and imposing on the people. He has no necessary hatred of better citizens than himself, nor of the rich; but he will sacrifice them if they stand in his way. The temptation under which he lies is to be jealous of other influences; in this spirit he will seize on any expedient which can serve him for an immediate end, will involve his country in war, or oppress the rich, or seek to change the laws or overthrow the constitution. In general, however, his plans are of a lower kind: he is the manager of political clubs or factions; he originates compromises; selects candidates for the people's votes—who thus obey him in their most responsible act of free citizenship; makes platforms calculated to secure the greatest number of votes, containing principles that perhaps are to be forgotten as soon as they have secured party success; spreads false reports of opposing parties or candidates; makes promises of inferior offices to his subordinates, and expects a reward for himself. In the end he will commit some mistake and lose his place; but the system requires that some one else shall fill it—some one, perhaps, who has ruined his influence. The *demus*, it was said of old, nourished such men in the pnyx on purpose, like public victims; and when it had no meat for supper, killed one of them who had been well fattened, and made its meal upon him.

The extreme democracy of ancient city-states showed itself in various ways, such as in the resort to the lot in appointments to office (although that, as we have seen, may have had other reasons for its existence), in calling the *demus* in large detachments into the courts, in

Marks of tendency  
to extreme democ-  
racy.

multiplying accusations for political offences (which, however, had the advantage of pitting demagogue against demagogue), in requiring the rich to contribute to the pleasure of the people in sundry expensive shows, and to bear burdensome public services. The tendency towards the same extreme appears in modern times in ways like these: (1) In the principle that the representative is bound to obey the will of his constituents. A very great power is given to the representative, and the check which has been most generally applied is to control him by the public will, by the expectations and fear of the displeasure of the community. Thus his will must be curbed by the will of others, when, by the very nature of the case, a moral responsibility rests on him which no others can relieve him of or assume. (2.) It is seen in the doctrine of rotation of office. An ordinary man of business would prefer to continue a capable agent in his service, until he mistrusted his fidelity. But the frequent change of functionaries follows the opinion that every one has a certain right to office, and so all who desire it ought to be gratified. Connected with this is (3) the removal from inferior offices in changes of party; which is doing so much mischief in making politics mercenary and in binding men together by the most selfish ties. (4.) Another great evil among us, the abridgement of the term of judicial office, and the election of the judges by the people, while it may have come into vogue from the fact that occasionally incompetent judges had to be endured until they were superannuated, seems to be owing to the pseudo-democratical principle that the people's will in regard to officers ought to be carried out, as far as possible, by an election of judges, in which they shall have a voice. Whereas, of all functionaries of government, judges ought to be chosen with the least regard to their political character and the most to their integrity. But the people know those who are candidates for the office of judge only on the political side; and those who conduct caucuses and manage nominations look mainly at rewards for such as have labored in the service of the party. The people want good judges,

but they are incompetent to decide who has the right judicial qualifications. There has been a sad falling down at the very point where it is the highest interest of every government, under whatever political form it be classified, to keep official character pure. The short term of the judges, also, seems to have no good reason for it ; for a man with a judicial experience of six, eight or ten years, has just laid the foundation for an understanding of law and a skill in deciding cases, which would be worth much more to the state than the apprenticeship, as it may be called, of his first years. If we have the right view of a state of things which is now very general, a lawyer who is prominent among, or a favorite of, the politicians, accepts the office as a means of acquiring a little more respectability, and expects, by being known as an ex-judge, to succeed better as a counsellor for the rest of his life. And so it must happen, even if under this system no charges could be made against the judges, that their dignity must sink in public estimation; and that they will be no longer looked on as the representatives of public righteousness and equity, but as men who came with no great repute of wisdom or justice upon the bench, in consequence of the action of a party with which they were connected. Can this gross mistake in regard to the appointment of judges fail of being corrected, or must it continue and bear even worse fruits than we have yet seen?

(5). Behind all this lies what we may call the caucus system, which includes all needed arrangements for bringing a set of candidates under the advocacy of the leaders of the party, as the regularly nominated ones, before the people. This mode of party action is not essential to the existence of parties. There must be parties in a free community, and they must endeavor to act together. There are parties as strictly separated by some kind of lines in Great Britain as ours in the United States. But they do not have the same compact organization, nor do the chief workers in them generally work for the rewards of a party triumph, nor have they the same proscriptive principles with our par-

Caucus system.



ties. To what is the difference owing? I believe the system to be at the bottom an emanation from universal suffrage; that the stratum of society which would be excluded from the polls by a very small property qualification needs to be informed whom to vote for; that while in general they desire good government, they are not competent to decide what it is, or who ought to administer it; that the best part of society will not attempt to instruct them, and that thus they are left in the hands of men who have their own points to carry by the means of such constituents. They would not vote as they do, if suddenly raised in intelligence and character. But as long as there is such a class, there is a demand for demagogues. And what is worth noticing, when by the help of such a class the leaders carry their points, the followers think that they have gained the victory, and it is a great cause of the solid coherence of parties after mistakes and weaknesses, that they who only vote and scarcely know why, are as eager for the party's success as any others. Whereas, from the beginning they may not have put forth one independent thought. No relation of subservience is more strikingly sad than this—that there are multitudes in the freest countries who can only vote according to the will of others, and yet all the while think themselves free and independent.

Whether there is any cure for these evils we shall consider in the section on parties in the United States.

#### § 201.

It has often been said that Athens gives us a sample of extreme democracy; it has been called “a fierce democracy,” and yet with all the faults of its constitution—which were in part forced upon it—it did not fall into those fits of fanatical suspicion, cruelty, and bloody strife, which blot the annals of some other Greek states. In fact, as soon as the principle of the government was secured against the opposite principle of oligarchy, it showed itself possessed of a certain moderation and refinement of taste, which to a great degree kept out scenes of violence; and it



had stability, order, and reverential feeling enough in it to allow the highest productions of human genius to grow up within its borders, the best men of heathen antiquity to be shaped by its institutions.

Solon's reforms, beginning in 594 B.C. (when, as a descendant of Codrus, he was chosen archon), arose out of the territorial factions which afflicted Athens, the insurrection of Cylon with its consequences, and the general misery of the free people not belonging to the nobility or eupatridæ. His social measures for the relief of distress were the noted *seisachtheia*, by which debts were either lowered in amount or wholly cancelled, to which were added a lowering of the money standard, (so that the same coin now was made into one hundred and thirty-eight drachmæ which before was needed for one hundred), and the release of mortgaged lands from their incumbrances. The necessity of these extreme measures we cannot judge of with accuracy, and indeed cannot be entirely sure what the *seisachtheia* was; but that was certainly a righteous measure, by which Solon's laws abolished servitude for debt, and brought back some citizens who had been sold into foreign lands. The political reforms of Solon were first the division of the citizens into classes four in number, according to their property in land; no estimate of personal property being taken as far as appears, which shows its relatively small amount. The first class had lands yielding five hundred *medimni* (at about three bushels each) of grain, or an equal number of *metretæ* (equal each to three-quarters of a medimnus) of wine or oil, and the two next three hundred and one hundred and fifty respectively of the same measures. The fourth class, the thetes or free laborers, were without landed property.\* The three upper classes had access to the public offices, the first alone to that of an archon and to a place in the court of Areopagus; and they were

\* Schömann, Gr. Alterth., i., 332, infers from a passage of Aristotle (Pol., ii., 4, § 4) that Solon by law fixed a maximum of property for the individual landowner; but the brief passage is ambiguous, and the fact, if I mistake not, nowhere else mentioned.

either obliged to serve at their own charges in war as horsemen or hoplites, or, as was the case with the third class, as heavy-armed soldiers only. The thetes had a place in the public assembly, and, ere long, at least in the courts; and were called on to serve as paid troops in the army or the fleet.

The senate (*βουλή*) consisted of four hundred chosen in equal numbers out of the then existing four tribes, and out of Solon's three upper property-classes. The relations of this senate to the ecclesia seem to have been much the same as they were under the full development of the democracy, with somewhat more of authority on their part, or of less on the part of the assembled people. The administration of justice was committed to the various magistrates, especially to the nine archons who had each his special competence. The magistrate decided cases himself, or referred them to a judge; and with this there was a right of appeal to larger courts selected from among the citizens—but how selected, by choice or lot, it is uncertain.\* Criminal cases were in part brought before the old courts of the Ephetæ, to whom was added a council composed of life-long members and supplied out of the board of archons, when their year was out, if they had served without censure. This board or council of the Areopagus had, with certain criminal jurisdiction, a supervision over magistrates, over the public assemblies, the morals and manners of the community.

In this constitution there was no extreme; it was rather dictated by a spirit of compromise, and of equity as Solon viewed equity. And such seems to have been the character of this singularly upright, unambitious man. His words, quoted by Plutarch (in vit., ch. 18), show his temper. He gave the people, he says, so much power as sufficed for them, neither taking away privilege from them, nor holding out more of it.

\* Comp. Schömann, *Griech. Alterth.*, i., 333. As for the rest of what is said on the constitutions of Athens, I must refer the reader to Schöm. u. s., C. F. Hermann, *Griech. Antiq.*, Part i., § 106 et seq., to Thirlwall, Grote, and E. Curtius.

"They who had power and were admired for their wealth, for them also I planned that they should have nothing that was unseemly. I stood holding a strong shield around both, and suffered neither to have the ascendancy without justice."

This endeavor to legislate for the times, to produce a balance between classes without a fixed political doctrine, proved abortive. The eupatridæ were still strong; party and local strife were not extinguished. The Pisistratidæ had their day like other high-minded tyrants of the better sort elsewhere, until at length the legislation of Clisthenes laid the foundation of a strictly democratic constitution. The substance of Solon's laws was retained by the Pisistratidæ, but the eupatridæ, who with Isagoras for a time gained the chief power in the state after their fall, would not, probably if they had been able, have allowed the constitution to continue as it was. In fact, the equilibrium of Solon was impossible. The first measure showing the democratic policy of Clisthenes was to give citizenship to a considerable number of strangers, slaves, and denizens. (Aristot., Pol., iii., 1, § 10). Another more important one was to abolish the old division of the people into four tribes, and to substitute for them ten new ones, which were subdivided into five *naukraiæ* each, and into ten *demi*. The tribes had no special political importance, except that of breaking up the old territorial divisions which had aided the influence of the aristocracy. The demes (townships answering to the word *comê*, as used by the Dorians, according to Aristot. Poet., 3, 6), originally a hundred in number, became afterwards one hundred and seventy-four, and in order to keep the tribes about equal, were shifted from one to another tribe so that they had no necessary territorial connection. Nor did the residents within the territory of a *deme* belong to it as a matter of course. The children pertained to the *deme* of the father wherever they lived, unless they passed into another such community through adoption. The demes were political unions and not properly religious; they kept registers of their members, and no one could be a citizen who

Changes after Solon.

Demi.

was not on these books, or whose name had been erased from them as being inscribed by fraud. The local divisions, as they ultimately appear, tended to destroy all local centres of union and all the old local political feeling, and to make Athens in a more eminent sense the capital of Attica than it had been before.

With the division into ten tribes the number of the senate was changed from four to five hundred, fifty from each tribe, and the members in the colleges of magistrates were changed in the same ratio.

In the time of Clisthenes the use of the lot instead of election was introduced, and continued through the whole period of Athenian freedom. This was not, however, simply an extreme democratic measure, as if every citizen had a right to office and increased his chance by taking it out of the control of the will of others. We should expect will to have the fullest sway in the form of government which was founded on the pleasure of the mass of the people. The lot must rather have been intended to prevent, as far as was possible, political clubs and combinations (*ἐταρπῆαι*) from interfering with the freedom of elections, and was due to the memory of the factions which had so much harmed Attica. It was so managed that the names only of those who presented themselves for the purpose were taken into account; and so it might happen that important men, like Themistocles or Aristides, might be drawn into the archonship because, when they wished the office, few who confided in them would be candidates against them. The lot, again, secured the state from cabals the more, because the colleges of public officers were often composed of ten or more, and the functions of officers were greatly subdivided. But, with great good sense, the Athenians elected, instead of drawing lots for, some of the principal officers, such as the ten generals and the treasurer of the city; nor were they apt to apply the lot in the case of extraordinary and occasional functionaries, such as ambassadors. Upon the whole it seems probable that the lot saved the city-state from some evils, and it is certain that the



influence of leading men like Pericles was not impaired by it. But it was a great political error to create by lot the nine archons who had the most important judicial duties to perform, and the importance of the senate would have been advantageously increased by another method of selection.

The ostracism, also, was a measure of Clisthenes or of his time. Its object was to remove for a period of  
Ostracism. ten years a prominent citizen, who might become so strong as to take the government into his hands, as Pisistratus had done in the preceding age. The rights of the ostracized person were only suspended, his property was untouched, and on his return he was admissible into any office. But it was unrighteous in itself, and when the two-handed engine came upon the heads of demagogues it fell into disuse. Thus, as a measure dictated by suspicion, it was democratical, and yet the suspicion was in a degree justified. It did not belong to extreme democracy, for in the later times of Athens, which leaned in that direction, other ways of reaching political men were brought into use.

Athens, as Clisthenes left it and the Persian wars found it, was a noble state, and through its heroic struggles in the first of those wars was fitted for the position of head of Greece. When its best citizen, Aristides, after the great invasion, carried the proposition to open the power of holding office to all  
Equality as to holding office. the classes of citizens, to the *thetes* as well as to the three classes of landowners, this was justified at least by gratitude for what all the citizens had done to save the country; and was recommended also by this consideration, that multitudes who before had been capable of holding office or had been officers, had been stripped of their all in the burning and ravaging of Athens.\* And the measure was further defensible on the ground that personal property, acquired in trade and manufactures, must have increased considerably since the time of Solon; so that the value of a land basis

\* Comp. Plut. Aristid. 22, and for the view of Schömann against Grote, here followed, his Gr. Alt., i., 340, and his criticism on Grote in his Verfassungsgesch. Athens. (1854.)



for suffrage could now with reason become doubtful. On the other hand, there would be no great pressure of the poorer class into office so long as its duties were discharged without salary.

But, whether just or not, this measure marks the direction which the Athenian constitution was now taking. Democracy in the time of Pericles. Still more decisively do the measures of Pericles and his friends in the next age show a democratic advance. These were : *first*, the pay given to those who were present in the ecclesia—if they chose to draw it—or who did service as dikasts in the courts ; *secondly*, the theoric money given out of the public treasury to pay for seats in the theatre and for other shows ; and *thirdly*, the abridgment of the duties of the Areopagus, so that thenceforth it lost its supervision over morals and public officers, and was confined principally to the duty of acting as a court in cases of murder and of certain other high crimes. After the fall of the thirty tyrants the Areopagus recovered part of its police and censorial power.

We have thus traced the constitution of Athens until it reached the condition of a complete democracy without any other strong opposing elements to contend with. And this absence of internal strife was its great good fortune, an advantage denied to many other states of Greece where the oligarchy and the democracy in their strife brought untold misery on the people. Athens, with all its political defects, was a republic where there were no wholesale cancellings of debts after the time of Solon, no attempts to overthrow the government, no conspirators relying on foreign aid, no street fights, no wholesale judicial murders, unless the doings of the thirty tyrants were an exception. Compared with Florence it was a haven of rest.

The prominent article of the constitution—if so we may call it—was, that while the people was the Laws and psephismata. source of power, no law and no resolution (psephisma) could originate in the assembly. A resolution must have been first proposed in the senate, and reported to

the assembly by that committee of the senate who were the presiding officers of the meeting: when brought before the people, it could be modified and so passed. But to propose a law, or originate a resolution in the ecclesia, subjected the author of it to a prosecution for doing illegal things (a *γραφὴ παρανόμων*), which, if brought before the court and decided against him, might bring on him a very heavy fine, if not the loss of life, and after three convictions for the offense the forfeiture of civic rights. This was one of the principal modes of attack by which opposing politicians sought to overthrow each other's power.

When new laws were to be enacted, the projects of them needed to be laid before a large committee of the people, called the *nomothetæ*, selected from the number of those who were annually appointed and sworn to sit as judges in the courts. The people in the ecclesia appointed five advocates of the old law; the proceedings before the *nomothetæ* were prepared by action on the part of the senate, and after examination the decision in favor of the new law seems to have brought with it, as a matter of course, abrogation of the old one.\*

A very remarkable feature of the Athenian political system was the absence of a central magistracy, and the complete independence of the functionaries upon one another. In many ancient city-states this was carried very far; thus, the consuls, prætors, quæstors, ædiles, tribunes, censors, at Rome, were not amenable nor properly subordinate to one another. But it went to a much greater length at Athens. Every board of officers was a kind of commission from the people, and accountable to them as well as to special boards of control appointed for the purpose. All official persons were subject, before entering upon their work, to an examination which related to their citizenship and character. Through the year, in the first assembly of every prytany, *i. e.*, ten times in the year, the

\* Comp. C. F. Hermann i. § 131.

people were asked whether the conduct of the public officers satisfied them, and at this time any citizen could bring a public complaint against any functionary on which the courts of justice would act, if the people thought the complaint to have a sufficient ground ; or the people itself might remove a man from his office by vote. Again, when the official year was closed, or any especial agency was terminated which involved the use of public money, the officer appeared before the board of *logistæ* to give in his reports, and his accounts were referred by them to still another board, the *enthynæ*, who were authorized to bring cases of misuse of public funds before the courts ; or, finally, any private person might appear as an accuser.

The dokimasia of the nine archons will show the amount of caution the Athenians used in respect to the  
Dokimasiæ.
most important magistrates. The examining board was the council of five hundred, who inquired not into their knowledge of law—where both parties would have failed alike—but whether they were Athenians on both father's and mother's side, to what *deme* they belonged, whether they honored Apollo Patrous and Zeus Herceius with their worship, whether they had shown filial piety toward their parents, had performed the required military service, and possessed the requisite property. The generals also were asked whether they were living in legitimate marriage and held real estate in Attica. A few responsible officers were thus required by law to hold landed property, although the archons, being selected by lot, were probably not of this number. All this care shows that the Athenians felt it necessary to check the facility of electing the worst men by especial examination of their fitness, and the *dokimasia* was the make-weight for the evils of the lot and of popular election.

The courts of Athens are the most remarkable feature of the polity, and probably had a greater bearing  
Courts of justice.
on political life than can be found in courts of any other state, ancient or modern. When the Heliastic

court system was perfected, it consisted first of six thousand citizens drawn by lot to be judges, of whom five thousand were assigned in ten equal squads to ten places of justice. These were the *dikasts* or judges, who, according to the importance of the case, sat together in numbers varying from one to five hundred, and sometimes even several courts were united together. The business brought before the courts passed first through the hands of preparing magistrates, whose principal name, "presidents of courts," shows that after preparation of a case they presided in the *dikasteries*, produced the written evidence in the case, kept order, had the votes of the judges counted, and announced the decision. These presidents of courts were very numerous; it was a principle that each public officer could be a president of a court within his own especial sphere, as the generals, the boards of control and the like; and, in fact, it was made the definition of a *magistrate* (an ἀρχή), that he had to do with public affairs for more than thirty days, and could preside over a court. This wonderful splitting up of judicial duty among so many magistrates, was due to the development of the democratic spirit since Solon. But the nine archons still retained most of the important jurisdiction in their hands, and several of the departments of law were assigned to one or another of them. Thus the archon, properly so called, had jurisdiction in cases pertaining to the family relations; the archon king in cases touching religion; the archon polemarch, in those where foreigners were concerned, being a sort of *prætor peregrinus*; while the six remaining ones, called by the general name of *thesmothetæ*, had the *dokimasiai* in their hands, and most private suits relative to property and obligations *ex contractu*. These, and other magistrates who presided in courts, had it for their especial duty to see to the summonses of the parties, and the proper bringing of the suit; to make the preparatory examinations; to have the evidence reduced to writing and fix on the time and place for the trial; to keep the evidence in a sealed vessel ready for use in court; to preside there—an office which included every step



necessary for carrying on the case to its close—and to announce the verdict.

This is not the place to dwell on Athenian trials ; we only notice one or two particulars. 1. There was  
 Trials. no public prosecutor, but every citizen enjoying full civic honor could make accusations. As a check on the strong propensity to bring suits without sufficient reason, the law provided that in some private suits the complainant, if he lost his suit so that not more than a fifth of the votes was in his favor, should pay to his adversary a sixth part of the estimate or damages. When a complainant had dropped a case after appearing before a magistrate, and in public suits where he had not more than one-fifth of the votes in his favor, he incurred a fine of a thousand *drachmæ* and was disqualified from instituting the same kind of suits afterward. 2. While in many cases the penalty for an illegal act was fixed, in a large number of public and private suits it was permitted to the plaintiff to make his estimate or lay his damages at any amount of money or of personal suffering, even at that of death, and for the defendant to put his estimate as low as he pleased. The judges, as it seems, had the power to give in their own estimate varying from those of the parties. This gave political enemies the power of attempting the ruin of their adversaries, while, on the other hand, high estimates were an argument of the defendant addressed to the pity of the judges. 3. When a private suit was decided, the victorious party had to take his own means to come into possession of what the court had adjudged to him; and he could be greatly worried during the attempt by a skilful opponent. 4. There were properly no appeals from a decision of the *dikasts* to any higher tribunal, although there were suits on the ground of not having been summoned by the adversary, or for “evil arts,” etc., which had the effect of setting aside the verdict, or of anticipating it by a suit of the original defendant. Appeals were allowed, however, in those cases,—probably very numerous,—where the proceedings were first begun before the public arbitrators, who



took the initiatory steps, just as the archon and other magistrate would have done, and thus saved him, if the case ever came before him, from a new examination of the case.

The dikasts, being a portion of the people, carried the political feelings of the less wealthy members of the community into the tribunals. Among the public suits or *γραφαι* were many which might have a political bearing, such as those for various kinds of military offences, for embezzling public money, for taking or offering bribes, for false claims of citizenship, for treason, tyranny, and putting down the democracy. Others were not only political but implied the existence of political parties. Such were the suits for misconduct on an embassy and for illegal doings (*γραφὴ παρανόμων*). The last suit afforded a good opportunity, for a political leader or demagogue, not only of putting a stop for the time to an objectionable law or resolution, but also of measuring swords before the courts with political adversaries. Aristophon of Azenia, a party leader of no small importance, just after the Peloponnesian war, boasted, according to Æschines (c. Ctes. 440 Reiske) that he had been a defendant in seventy-five suits of illegality. Such suits must have been intensely interesting, as the charm of personal contest was combined with party zeal; and before one or two thousand judges they afforded the highest field for eloquence. It ought to be taken into consideration, also, that many of the parties were well-known to the judges, so that the verdict could seldom be unbiassed.

To this are to be added accusations brought before the people or the senate which called for some special vote against an obnoxious citizen, with which, as *prima facie* evidence of guilt against him, his foe could appear before the tribunal of justice.

A very considerable number of days in the year were devoted to the holding of courts, so that the large detachments of the people, to whom the duty of judging was given by lot, were kept busy. Before Pericles was prime minister of Athens, the judges served

Pay in courts and the ecclesia.

without pay. It was certainly not unfair, if the judges should not consist mainly of wealthy men—of whom probably a sufficient number could not be found for this purpose, especially as they were called into the fleet or the army in the Peloponnesian war—to give a small dole of one *obolus*, per diem, to those who served the state in this capacity. This pay, instituted by Pericles (Aristot. Pol., ii., 9, § 3), was increased to three oboli by Cleon, as Boeckh tries to show (Staatshaush., ii., 14). This increase, if the pay was one obol at first, was not unjust, when the war drove many into the city and prices grew higher. In the same way the pay for being at an assembly was one obolus at first and afterwards three; the change being made by the influence of the demagogue Agyrrhius about 390 B. C., some time after the end of the Peloponnesian war.

The philosophers who lived soon after Pericles ascribe to <sup>Effects of this</sup> him a corrupting influence on account of this <sup>pay.</sup> measure. Plato makes Socrates say in the Gorgias (515 E) that he “made the Athenians lazy, cowardly, talkative and greedy of money by first bringing them to the taking of pay for the performance of political duties.” And Aristotle says that “Ephialtes abridged the powers of the council on the Areopagus, and Pericles gave pay to the courts. Thus it is that each one of the demagogues advanced and strengthened the democracy until it reached its present condition.” (Pol., ii., 9, § 3.) “This seems to have gone on, not according to the design of Solon, but to have come about by accident. For the *demus*, having become the cause of the naval supremacy in the times of the Median wars, grew proud and took for itself corrupt demagogues, the upright men being on the opposite side in politics.” (u. s. § 4.) The Wasps of Aristophanes also abound in references to the political side of the judicial system. The members of the chorus exhort one another to “hurry on, for Laches has got to take it, and all say that he has a hoard of money. Cleon, therefore, yesterday bade us come in season with a provision of three days’ fierce wrath against him

to punish him for his wrong deeds" (v. 240). And so also the suspicion of conspiracies to bring about a tyranny is most exquisitely ridiculed in vv. 488, 499. And the worthy old dikasts are charged with being slaves to the political managers who take all the bribes while they are content with their pittance of pay. (666 et seq.) There is reason to believe that this opinion entertained by conservative persons like Aristophanes and Plato was not a distorted one. The courts were felt to be the watchmen of the state, but being under the demagogues and bringing every prejudice with them and every suspicion, they could not but be partial and often unjust. Hence, and because of their ignorance of law, they were open to all pleas *ad misericordiam*, to all claims for deserving well of the people; and considerations had weight, even where the trial was not a political one, which a modern advocate would not be allowed to use. In fact, from a general knowledge of the parties in suits the dikasts must have been prepossessed for one or the other; and few tribunals of one or two hundred men could have contained a majority of unbiassed triers of a case. And yet the spirit prevailing in the Athenian courts must have been far fairer and milder than that which oligarchical state-systems cherished. When the Thirty governed Athens, they abolished the popular tribunals and the Areopagus; and the council of the four hundred, established a little before, was entrusted with the judicial power in criminal cases, but was required to give open votes in the presence of the tyrants.\*

The judicial system was in a manner necessary, if we consider the previous history of Athens, and the  
Liturgiæ.
 usages of Greek states; but another emanation of the democratical spirit had no such apology. We refer to the burdens laid on the rich by the state for the pleasure of the people. These burdens were grouped together under the name *liturgiæ*, or public services, and included the offices of the leader of a chorus, of the director in sacred games, such

\* Comp. E. Curtius, trans., iv., 22, Amer. ed.

as torch races on foot or horseback, of the chief of a sacred embassy (*architheoria*), with that of feasting the members of a tribe and with some others. These constantly recurred, but the *trierarchia* or duty of commanding a galley was imposed only on special occasions. Every man, with property valued at three talents (about \$3,200), was bound to discharge these services at his own cost, but could not be called upon twice during the same year. The tribes had each its turn and selected each its wealthier members in regular order. If a less rich member was put forward for a *liturgia* before a richer, he could have the decision made between him and the other by a peculiar process of law. These shows began before the time of Solon, so that the completed democracy was not answerable for them. But with the increase of refinement they increased in expensiveness; rivalry between persons or tribes increased the cost, and it became a most serious burden. The trierarchy was the successor of the times before the democracy was established, when each of the *naucrariæ* or taxable divisions, fifty in number, was obliged to furnish a ship. Afterwards it fell to the generals to select the necessary number of men holding the greatest amount of assessed property, who should be obliged to furnish each a galley and keep it in repair during his time of service, the state answering for the bare ship and the crew's pay. This was a grinding duty, as is shown by the several shapes it took in process of time. The complaints concerning these duties are not infrequent. Isocrates says that "it is more grievous for owners of property to live at Athens than for those who are continually poor." Xenophon, in his *Convivium*, makes Charmides, the friend of Socrates, say: "When I was a wealthy man here, I was afraid in the first place that some one would break through into my house, take my property and do some evil to my person. Then I courted the informers and accusers, as knowing that I could receive more harm from them than they could from me. For orders would be given to me continually by the city to be spending something, and I was never allowed to go abroad. But now



that I am deprived of what I own beyond the borders, and I receive no revenues from my property in Attica, and what I had in my house has been sold ; I sleep, quietly stretching myself out, and I have become to the city an object of trust and no one threatens me, while I threaten others and like a freeman can go abroad or stay at home. And rich men even rise up when they see me coming, and let me have their seats and step aside for me to pass. Then I paid tribute to the city, now the city, bringing me its contributions, maintains me." \*

These services of the wealthy are not to be regarded as a tax, for they were called for when there were no property-taxes, and those who were free from the usual *liturgiæ*, as heiress daughters and minors, bore the other burden. The *cisphora*, or property-tax, was first introduced in 377 B. C., and classes were established in which, as afterwards in the towns under the decaying empire of Rome, the wealthier members advanced the contribution of the rest, and then collected from the other members their shares amicably or by process of law. This advance for others sometimes bore the name of a *liturgia*, and was a process full of injustice. It is worth while to add that in other democracies the same plan was pursued, and that, if Boeckh is correct † in making the first of Solon's classes liable to pay taxes on the whole of its income, while the second paid only on five-sixths, and the third on five-ninths, we should have here a sliding scale against the more wealthy of very doubtful justice ; an instance of which, however, has recently occurred in the United States, where incomes above a certain amount paid an income tax of ten per cent., and those below of only five.

When democracy at Athens took its final form, and while demagogues, the radical nuisance, corrupted the people at home for their own ends, thus destroying the energies of the state, there was far less of oppression, during the supremacy

\* Comp. also Xen. *Æcon*, II, 6, and various places in Aristotle's *politics*, and C. F. Hermann, *u. s.*, i., §§ 68, 160-162.

† Comp. Boeckh, *Staatsh.*, book iv., § 5.



of Athens, over the sea-states, their confederates, than was exercised by Sparta in her supremacy. Nor were the rich at home more bled for public uses than they could bear; for otherwise the state would have soon sunk, but it was for them a pleasant home as it was for the poor and for the crowds of aliens. And we must not forget, in estimating the policy of ancient states according to its moral character, that the sense of personal rights over against the interests of the whole community, or of the leading element in it, was but small.

### § 202.

We close what we have to say on democratic states with the mention of some particulars wherein the modern democracy differs from the ancient. And here it may be doubted whether modern democracy may be spoken of as a genus without noticing the differences between the manifestation of its spirit in different countries. The great contrast between the latest forms is that between the French type and the type in the United States. And here we cannot separate the genius of the two races from the color which their attempts at constructing new governments have taken. Equally important is it also to estimate the bearing of their past political habits upon their judgments when they were called upon to build up new fabrics of government. The French, after their work of destruction was over, had no habits of self-government to start with upon a new career. That was the crime of the old régime that it put out of the way what it could of self-government, and lived on amid changes of opinion as to all subjects of thought, blind in regard to tendencies until the tendencies could not be controlled. The inheritance of the French democrats consisted in theories of rights, in letting speculation preside over the work of reconstructing society. The American change of forms—I refer to the colonies' entire independence on the mother country, and to the union of states—was altogether different. The colonies had been used to self-government in the minor divisions of the communities and in the general affairs of the

colonies themselves. Those colonies which had governors appointed by the crown were self-governing in all things else ; the few that chose their own chief magistrate were practically independent, with only a possible interference on the part of the crown owing to violations of their charters. They all made their own laws, laid taxes, elected their own representatives, coined money, contracted debts, established chartered companies ; and some of the oldest had an established church, limited only by the toleration act of William III. Thus when a crisis came they had all necessary political habits, the knowledge of English precedents, and a reliance on the experience of many years' contest with trials incident to new settlements. Add to this that partial confederations had pointed the way to concerted action whenever the times should call for it. (Comp. § 212, beginning.)

The difficulties of the French in reconstruction were many times greater than those of the United States. Both had to resort during their revolutions to paper money, and both were bankrupt. But France had powerful classes to contend with ; a vast peasantry, which had been religiously trained under despotical power, to be secured for the revolution ; vast bodies having an interest unlike that of the revolutionists, to be watched or driven out ; and then all Europe in arms against the fanatical spread of the new ideas. Nothing of this existed on the western side of the Atlantic. The people were substantially one. No religious, nor, at that time, social or sectional differences divided them. There was little of *furor* in the movement. Practical ends, with a feeling that they were injured in their rights as Englishmen, nerved them for the war. They fought religiously, and a regiment went from one quarter, with the minister of the parish where many of the men were recruited for their chaplain. They carried away from the war no hatred of the mother country, although it must be confessed that the impressment of seamen by Great Britain and a great infusion of disaffected persons from abroad afterwards, to a considerable extent, changed their feeling of regard for the land of the ancestors.

It will thus be seen that the revolutionary war was not strictly a war of theory, nor was there any cry of "liberty, fraternity and equality," as if these things were not enjoyed already. In addition to this there was a great degree of steadiness, a social stability in the American colonies, wholly unlike the unsteady, never-ceasing dissatisfaction of the French people with the present, leading on to new experiments of revolution. Two of the smallest states (Connecticut and Rhode Island) had for their instruments of government the charters granted by Charles II. With these they went through the revolution and into the present century. The steadiness of one of them will show how the political habits of small self-governing bodies can continue the same through several generations, when there are few changes and no sudden changes in the structure of society; when there is a very general equality of possessions and nearly all are landowners. The charter of Charles II., granted in 1662, provided for electing a governor, deputy-governor, and twelve assistants, and for a meeting twice a year of these officers and of the freemen, or of not more than two of them selected from each place, town or city, to be called the general assembly. The powers granted to this assembly included the establishment of courts of justice, the passage of all *reasonable* laws not contrary to the laws of England, the administration of oaths, the institution of a military power, including land and sea-forces, sufficient for their own defence, free importation and exportation, subject to duties, customs, or subsidies payable to the king and his successors. The right of taxing the inhabitants for the support of the colonial government seems to have been regarded as a matter of course, and is not expressly mentioned, nor is anything directly said in the charter of the right to establish religion by law, which was fully acted on some forty-five years afterwards, although the general assembly had powers given to it to "dispose" of matters not mentioned, whereby the inhabitants might be religiously and civilly governed. Under this highly popular government elections were held for "assistants" and representatives

twice a year and for executive officers once. Yet simplicity of life and the absence of public agitations to a great extent, together with the sober religious character and homogeneous English descent of the people, produced a steadiness of habits which made these semi-annual elections and the annual elections of judges almost forms. The same persons were chosen over and over again. In one instance a representative was chosen by his town for seventy-two sessions or thirty-six years for the general assembly; and three secretaries of state filled that office for ninety-seven years in succession from 1712 onward. Three treasurers had an official life of nineteen, thirty-seven and thirty-one years respectively; and the terms of eight governors amounted to eighty-three years. This is a favorable specimen of the colonial and post-revolutionary governments; but the contrast in all the colonies between the steadiness of habits and modern fluctuations has been very considerable.

The change in the habits of American democracies which the last seventy-five years have brought with them is exceedingly great. The leading causes of this change are three: the changes in the condition of society as it respects wealth, diversity of employment, and the growth of cities; the infusion of new elements, especially from the lower classes of Europe; and the gradual reception of doctrines of political rights, which belong to extreme democracy. They are seen in such doctrines as these: that office should be held for a short term in order to let the people use their power the oftener; that judges should be elected by the people, and not for life but for short terms; that the representative is bound to obey his constituents' will; that the triumph of a party must be followed by a general sweep of officials of the defeated party out of power; that election-districts must have an equality of numbers as nearly as possible. These or most of them, having been referred to before, are only mentioned. In their company appear bribery, ballot-stuffing, intimidation of electors, violence at the polls, a general lowering of the character of candidates for public places, the caucus-system, and



neglect, on the part of many, of their political duties. Without the verging of doctrine toward extreme democracy, most of these evils would be slight; yet the contrast seems to show that no political institutions of liberty can stand their ground against social changes. We find now that men who are universally believed to have paid money to the electors or to the legislatures hold up their heads; and the crime is seldom noticed, less frequently brought to light.

Doctrine in politics has had a much wider sweep in France, and indeed elsewhere in Europe, but, owing to the tendencies towards extreme measures, such as the people voting in a tyrant, and to the ill-success of democratic government there on the whole, the national feeling is becoming by experience more practical in its aims and judgments. The great fundamental principle of practical politics is now more admitted than it was once, namely: that governments in their forms are not to be judged of on theory alone, because they present a balance of powers and equitable adjustment of claims; but by their capacity to hold their ground in a nation and to secure national happiness.

Modern theories of communism, which have had their hot-bed in great French centres of population, but are diffused more or less over the rest of the Christian world, show the fanatical power of political dogma in its worst form. The ancient city-states were sometimes infested by cries for a new division of property, but the prevalence of slavery and of slaves from abroad prevented this evil, if it brought others. As this is a theory which will infallibly lead to intestine war, and has a plausible side, its obvious leadings are calculated to produce greater distrust of democratic principles than all other parts of extreme democracy.

Connected with the differences as it respects speculation in the two countries which we have selected as types of modern democracy, is the greater rigor of the French in pulling down everything that stands in the way of theory, which may be described as the sacrifice of other considerations to logical deduction and to system. They demand the arithmetical



equality of which Plato speaks, rather than the geometrical. We lean in the same direction, but are not so greatly shocked at institutions which do not conform strictly to the rule. The equal power of states greatly unequal in size, in the senate, is a standing protest against sacrificing everything to exactness of measure in politics. This will probably hold its own, however, not because of its being received, but because of the obvious justice with which the small states demanded it, and their unwillingness to come under the constitution on any other condition. Of inequalities of representation within the States, there have been a few, but they have created no practical difficulty. In South Carolina, formerly the lower or seaboard districts had much more political power than the upland ones. At present in Connecticut the agricultural towns have far more than their share of power in the legislature, owing to their decrease, and yet more to the great increase of the cities and large towns in population and wealth. The districts for choosing senators, twenty-one in number, range in their population from fifty-four and fifty-nine thousand, to about fourteen, thirteen, and nine thousand. In the house of representatives, 40 members from twenty-two towns, in 1873, represented 270,000 inhabitants, while 202 members from 107 towns represented 267,000. The three largest cities at the same time sent five members in all to the house, while they contained one-fifth of the entire population. The largest city, with over 75,000 inhabitants, sends two representatives equally with a little town containing only 627. And the inequalities in the representation of wealth are still greater. These disproportions are too great not to cure themselves in the end, but the practical difficulties to which they give rise are not serious, because the small towns are scattered all over the commonwealth, and have no common interests unless to keep down taxation. On this subject Mr. Freeman (*Hist. Essays*, ii., p. 265) well remarks that "the greater the constituency is, the fewer members it needs in proportion to its numbers, because it has greater means of influencing parliament and the country in other

ways. The interests of the smaller constituencies need therefore to be protected, by giving them a proportionately larger number of members." To which it may be added, that as all represent the whole community, the question who shall choose them, and in what way, is more to be decided by practice than by theory.

The ancient democracies—small in size, with a concentrated population, susceptible of intense excitements, having no definite notion of personal rights, often ready to play the tyrant (like other forms of power), when they had secure possession of the state without checks and breaks such as the representative system furnishes—are not that form of popular government which can fairly be used as the test of democratic principles. A country where all, or nearly all, are landholders, where intelligence is diffused, and action under excitement over a large territory is very difficult,—above all, where the religious and social condition is good,—will, for a long time, thrive under the stimulating atmosphere of democracy. Those who wish to rise in the world will feel that it affords all helps which they need. Personal rights, free choice of employments, all the advantages that a government can secure, are secured for them. Under favorable circumstances a democratic republic may be one of the quietest and steadiest of governments. But it is that one which feels most the changes in society, particularly the changes in wealth and moral principle. It is that one which, when the self-governing power is lost, crumbles to pieces, or is subject to a power above its own, most easily. As long as equality of condition and simplicity of life remain, it secures contentment, manliness, self-restraint, and obedience to law, such as are nowhere else to be found. But the changes in society, changes which men can neither prevent nor foresee, are stronger than constitutions. The principle of representation, indeed, it would appear, is the most valuable improvement in politics that has been made by the modern world, and reconciles order with freedom more effectually than bayonets or spies. But neither representation nor any other conservative

force lying in institutions can save a government by the people and for the people from the decay and disintegration which attends on a society without moral principle and without hope. (Comp. §§ 274, 276.)

## CHAPTER VII.

### COMPOSITE GOVERNMENTS, GOVERNMENT OF COLONIES.

#### § 203.

BESIDES the states which we have now considered, as having a simple form of polity, there are those Composite governments. gov- which may be called composite or compound. By this term, which we venture to use as including for convenience a number of forms of union between political parts making one whole, we do not intend to express any logical order or close connection of the different unions which will come before our view, but only to arrange them under a not inapposite general term. Among these forms confederations would take the precedence historically; but we prefer another order, especially for the reason that the earlier confederations did not reach the solidity of states, being no more, the greater part of them, than mere leagues. On the other hand, all the great empires formed by conquest embrace under one head a number of states having little or no coherence with one another, except as being all under one head. And the relation to the head may have been not very close,—nothing perhaps, besides acknowledging the great conqueror as their lord, and paying him a tribute. The national feelings of the conquered, or difficulties in the governing country, or the ambition of a deposed line may have broken that union, and rendered another conquest necessary for its restoration. The history of conquests makes up a large part of our knowledge of some nations. Thus, the annals opened to us at the present day by the scholars who have deciphered and revealed Assyrian history, reveal conflicts often repeated by the kings of that country over a multitude of little states, many of which cannot now even be identified. Tribute in great part is the

end, the kinglets of native stock are often continued, or on a second rebellion they are taken captives and another line put in their place ; but, in general, the usages, the religion, the language, and all that constitutes nationality except self-government, remained as before. Sometimes, when a conquered province had been very rebellious, or lay in a position where it could impede the conqueror's progress, the cruel expedient was adopted which Assyria and Babylon tried with the Jews and others, of deportation to another territory, where, although living to a degree together, they could not be dangerous.\*

This is the first form of compound governments, where provinces or nationalities *are conquered, but not absorbed nor incorporated* into the conquering nation. The good effects of such a connection cannot be very great for there is no unifying process going forward, and no such was aimed at. It no doubt was important for the commerce of the world that through the sway of large states over weak ones, men could travel and trade with more safety over large territories, but no institutions, no awakening of the human mind come directly from such movements.

The relations between a state and another organized body or another state, included in this chapter, may be reduced to unions which implied subjection of one party, and those formed on terms of equality. Under the first of these divisions, may be arranged that condition of things which allowed a conquered or protected state some degree of self-government, whether under independent rulers or in the form of provinces ; and that relation of a mother-country to its colonies in which a greater or a less degree of self-government is accorded to them. In the second class, confederations in their two forms may be placed, together with states otherwise nearly or quite separate, except that they are under a common sovereign.

\* For the Assyrian history, Geo. Smith's *Assurbanipal*, and especially J. Menant's "*Annales des rois d'Assyrie*" (Paris, 1874), may be consulted. This work gives a lively picture of conquests of the same territory effected over and over again.



From the latter those organizations differ, where sovereign and legislature are common to two or more states, and all things tend to bring them into one consolidated form. Sweden and Norway since 1814, Great Britain and Ireland, after the union of 1800, may serve as types of the former; the three constituent parts of the United kingdom of Great Britain and Ireland, of the latter. As this kind of union is rare and of little practical importance, we may pass it by in silence.

We will look first at the structure of the Persian empire, and, in passing, at the Macedonian system in regard to subject states; then somewhat more at large at the plan of Rome in regard to her colonies and conquests. In modern times the policy of Spain and England will call for our attention, after which the principal subject of this chapter, confederations, will be considered.

Under Darius Hystaspes, the administration of the empire took the shape which it retained ever afterwards. In the year 515 B. C., a division of the dominions was made into twenty provinces, the presiding officer over each of which was called a *satrap* or protector of the country.\* Some of these satrapies were vast in extent and population; thus Assyria and Babylonia formed one, and Ægypt with Cyrene and Barca another. Subordinate divisions were made in some of them, and their principal officer received the name of a *pechah*, which is applied to Zerubbabel and Nehemiah, governors of Judah, and may be the origin of the modern title of *pasha*. The satraps would have become independent sovereigns, if care had not been taken first to appoint to this office, for the most part, Persians educated at the court, and then to inspect their administration continually both in public and in secret ways. An un-

\* Bertheau on Ezra viii., 36, interprets the Persian word *Kshatrapavan* as meaning guardian of the land; Duncker, *Gesch. d. Alterth.*, ii., 890, as guardian of the kingdom. Col. Rawlinson derives it from *Kshatram*, crown or empire, and *pa*, keeper, preserver. Comp. Prof. Rawlinson's note on Herodot., i., p. 256, Amer. Ed.

faithful or rebellious satrap might be seized and executed without trial by some commissioner from the great king. Constant inspection was practiced through commissaries sent every year over the provinces, with power to remove abuses, and obligation to report to the king. This natural institution reminds one of the *missi regii* of Charlemagne. Besides these there was associated with each of the governors (Herodot., iii., 128) a royal scribe, who received letters and seems to have been a sort of spy on his principal. The officers, also, who were called *the eye* and *the ear* of the king seem to have inspected the conduct of the officials through the empire;—the latter, pursuing more a system of secret espionage than the other. And the separation of military from civil power in the original plan of the administration, which was extensively given up afterwards, was another check on the satrap to whom the civil relations with the provinces were intrusted. A system of posts for the use of government officers must have greatly aided the central administration. (Esther iii., 13, 15, Herodot., viii., 98.) With all these checks the governors were often unfaithful or misused their almost regal power.

The policy of Persia was, like that of other great oriental despotisms, to leave the conquered nations in the enjoyment of their own laws, and the local officers in possession of their former power. The Greek towns in Ionia and the islands were for the most part undisturbed in their polity, and the tyrants who were masters of some of them were found a convenient medium of communication with the people. When, however, Mardonius on the first expedition into Europe in 492 came down to the coast with his army, he put down the tyrants of the Greek towns and established democratical constitutions, the chiefs of the cities having not long before showed themselves altogether untrustworthy. (Herodot., v., 37, vi., 43.)

The great object in the Persian empire was to collect from the provinces as large a tribute as was possible, either in products of the soil, as was generally the case in the inland territories, or in silver or gold as was the custom in com-

mercial Ionia. Until Darius, no fixed tribute had been levied, only gifts were offered. Herodotus (iii., 90-94) gives the sums which were paid by the several satrapies, which are almost all reckoned in money. Thus the first satrapy, comprehending with Ionia several adjoining districts, paid 400 talents (\$400,000); Phenicia, Palestine and Cyprus, forming the fifth satrapy, 350; Egypt with adjoining parts of Libya, Cyrene and Barca, 700, together with the profits of the fisheries in lake Mœris, and grain furnished to 120,000 Persians at Memphis; India the largest tribute of 350 talents [weight] of gold dust. The whole revenue, amounting at first to about fifteen millions of dollars, does not speak of a heavy taxation. Later it was somewhat increased. And perhaps local payments may have been made, for a time or as a rule, for the support of the army and for other purposes. Media rendered 100,000 sheep besides a number of mules and horses; Cappadocia, half as many; Armenia, 20,000 colts; Cilicia, 360 white horses and 140 talents. The main object of the whole arrangement, says Prof. Rawlinson (*Anc. Mon.*, iii., 421), was evidently the taxation of each province proportionate to its wealth and resources.

Taking everything into account, we are led to judge that Prof. Rawlinson accords with the truth when he says that "it would seem that while the caprice and cruelty of the kings rendered the condition of the satraps and other great men as bad as it has ever been under the worst of the oriental despotisms, the oppression of the masses was lighter than at almost any other period in eastern history." There was not, however, anything civilizing or uniting in the way in which the Persians managed the territory conquered by their arms.\*

When Alexander put Greek power in the place of Persian  
Macedonian system. power, his early death and the breaking up of his empire prevented the development of any change of government in the provinces. The policy however

\* Comp. Heeren, Ideen, Rawlinson, Transl. of Herodot. Append. to Book, iii., Essay, 3; his *Ancient Monarchies*, iii., 417, onw. Duncker, u. s., i., 884 onw. (ed. 3.)

of Alexander went far beyond that of the Persian kings, in respect to the founding of cities, seventy-two of which are said by Plutarch to have owed their origin to him. But these or as many as he planted, for the number may be a gross exaggeration (Comp. Grote, xii., 360), were built chiefly for military security, and not with the direct purpose of Hellenizing the conquered provinces. Seleucus Nicator, to whom Syria and all the east at length fell, divided up his realm into seventy-two satrapies, and established colonies on an extensive scale. That under the Syrian kings Hellenic culture penetrated to some degree into the remote east, may be gathered even from the style of the coins there found. But Seleucus and his successors governed through Greeks, and did not aim to conciliate their oriental subjects, so that their hold on the east was of short duration. Alexander, on the other hand, would have endeavored to suit his administration to his oriental position and subjects, and would have disgusted his Greeks, as indeed he did disgust them, by his oriental pride and luxury before his death.

The Romans conquered an immense number of nationalities, and pursued a policy at once steady and adapted to the circumstances of the time and the conquered people. At an early period colonies of Roman citizens were established on newly acquired territory in Italy, originally along the coast, to serve at once as supports of Roman power and as helps to the poorer classes in the parent state. Almost always a colony was sent to a place formerly occupied and was not altogether a new foundation. Dionys. Hal., ii., § 16, represents the policy to have been "not to visit the captured cities with wholesale slaughter, but to send settlers into them on condition of holding a certain portion of the lands, and to make the places thus conquered Roman colonies, to some of which citizenship was imparted." This describes the policy from the first. These colonists, however, formed simple dependencies with local rights, but without any of the political rights of citizens after the first settlers had passed away. The later colonies planted in northern

The Romans.



Italy, about thirty-four in all, were called Latin colonies, and had no privilege of acquiring the right of eligibility to office in case of a removal to Rome, but had a limited right of suffrage with other political rights and duties. (Comp. Mommsen, i., 538, 440.) The colonists in northern Italy, after the establishment in B. C. 181, of Aquileia, a Latin colony, received full Roman rights. One of the measures of Caius Gracchus, B. C. 122, was to send six thousand colonists to make a new settlement on the site of Carthage, with the rights of a Roman burgess-colony. This was important as "establishing the principle of emigration across the sea and opening up for the Italian proletariat a permanent outlet." (Mommsen, iii., 138.) Soon afterwards, Narbo in Gaul, beyond the Alps, was founded (B. C. 118). During the predominance of Sulla, vast tracts in middle Italy were assigned to soldiers, on the plan, however, of attaching them to a *municipium* already existing. Julius Cæsar pursued the policy of converting the soldiers whose term of service was over into agricultural colonists, and in order to empty Rome of its poorer class he designed to send out beyond the seas eighty thousand settlers of this description. The triumvirs in B. C. 43, promised to give up to their soldiers eighteen Italian towns, and after the battle of Philippi one hundred and seventy thousand men were to be provided for. The people of the towns just spoken of seem to have been forced to give up their landed property in the way of a forced sale, but the price was never paid out of the treasury. Augustus planted a large number of colonies in Africa, Sicily, Macedonia, both Spains, Achaia, Asia, Syria, Gallia Narbonnensis, Pisidia, properly consisting of veteran soldiers, and called military colonies, but containing also numbers of the poorest class in the city and in Italy. Other emperors, as Claudius and Nerva, followed the example. Trajan sent great multitudes of men into Dacia which had been depopulated by the wars of Decebalus. Although these settlers came *ex toto orbe Romano*, as an old writer says, yet the power of Roman civilization is expressed in the fact that the Walachian language



owes its origin to the Romans settled in Dacia at that period. Nor can we doubt that colonies and settlements of Romans in Spain and Gaul, together with soldiers returning there, did much towards helping the dialects derived from the Latin in those countries to take root. The Roman colonies then owed their foundations to several motives ; first, to the desire of protecting the territories won by war ; next, to that of removing the pauper class from Rome ; and afterwards, to that of scattering abroad and giving rewards to soldiers, which rewards were a stimulus to future enlistments.\* The influence of the system, which was essentially administrative and political without commercial motives, was to spread the laws, language, turn of thinking of Rome, and to help in consolidating the empire.

The treatment of the people in the provinces is so vast a subject that only a faint and diminished outline of it can be exhibited.

A province, in the local sense of the word *provincia*, denoted a land subjugated in war and placed under the administration of a Roman governor, a proconsul or proprætor, or, under Augustus, after the division between senatorial and imperial provinces took effect, either governed by the emperor's vicars bearing different names, or, where they needed no military control, by the senate, as before the institution of the empire. The first that was ever established was Sicily, in 241 B. C. ; at the death of Augustus there were about thirty ; a little after the end of the first Christian century, some forty-six or forty-seven. As a general rule at first, the conquering officer with a delegation of ten senators, acting according to instructions of the senate, laid down the platform which was to serve for the future government of the province. In the instance of Sicily this was not done for many years subsequent to the first occupation ; but the later provinces, when the plan had been adopted, were remodelled soon after their sub-

\* Comp. esp. Marquardt in Bekker—Marq., iii., 1, 311, and Zumpt's commentationes epigraph.

mission to the power of Rome. Thus Æmilius Paullus with ten legates reconstructed Macedonia soon after the battle of Pydna, in B. C. 168 ; and at the same time, with the intervention of five legates, Illyricum was reduced to its provincial condition. In every case a policy was followed of preventing insurrections afterward ; and provinces which had given trouble or contained the seeds of future disturbance were jealously dealt with. Thus it was ordained in the case of Macedonia that the country should be broken up into four regions, each having its own council, and composed of parts confederated together, which, with the communities composing them, were left to tax themselves. Half of the annual proceeds of the former land-tax, paid to the kings, was now paid to the Romans, that is, one hundred talents. The former domains and the mines, which naturally fell to the conquerors, were utilized by them. All officials of the deposed king, Perseus, had to go into banishment to Italy. Salt could not be imported nor timber exported. The people were disarmed and the fortress of Demetrias destroyed. Intermarriages and purchases of houses and lands between the different regions were prohibited. As for the rest, the laws were continued and the communities elected their officers; but the upper class, both in the regions and the communities, were put into possession of the government. Much the same course was pursued at the same time with Illyricum, which was broken up into three parts.\* Livy's observations on these transactions are worth noticing, on account of their looking aside from the evident motive of the conqueror. "It seemed good that Macedonians and Illyrians should be free in order that all the nations might perceive that the arms of the Roman people did not bring slavery to the free but freedom to the enslaved ; so that the nations which were in the enjoyment of liberty might believe that it would be secure for them and under a

\* Comp. Mommsen's hist., u. s., ii., 357, onw., in the transl., Livy xlv., § 18, with Weissenborn's notes and § 29, Marquardt, u. s., iii., 1, p. 115.

perpetual guardianship, and that those which lived under kings might believe that they would find these kings for the present milder and juster, out of consideration of the Romans; and that, if at any time war should break out between these kings and the Roman people, its issue, while it would bring victory to the Romans, would bring liberty to them." That among other considerations, the impression to be made on other nations was a motive is unquestionable; but these Macedonians who could not buy a house out of their own district were certainly free within but a small territory; and in this, as in every case, the policy of easily managing and easily spreading conquests was the main consideration.

The treatment of other Greek states shows the same entirely selfish policy, and none more than that of Rhodes, which had been a privileged ally of Rome, and had abstained from all sympathy with Macedonia in its last struggles. The Rhodians, owing to an ill-advised attempt on their part, suggested by a Roman officer, to act as mediators between Perseus and Rome, incurred the displeasure of the senate; their possessions on the mainland were taken from them, which yielded one hundred and twenty talents annually; and irritating obstructions were placed in the way of their commerce. The island subsequently received harsh and mild treatment from Rome by turns. Under Claudius, as Tacitus says, "liberty was restored to the Rhodians, having been often taken away or confirmed according to their merits in foreign wars or their ill-conduct in domestic seditions." (*Annal.* xii., 58.) In the same passage it is said that the inhabitants of Ilium at the same time were freed from every public obligation or service. This favored place, the home of the mythical ancestors of Rome, had been exempted from paying tribute by Julius Cæsar, who also enlarged their territory—privileges which remained for some length of time afterward.

The system of provincial rule, complicated in itself, was made further so by the exemptions or privileges granted to certain places. Most of these places were situated in the Greek-speaking part of the empire, as in Sicily, Achaia and

the province of Asia. They have been divided, in respect to their relations to the supreme power at Rome, into several classes. The most privileged class was that of the *free and allied cities*. They were such as had freely united themselves to the Romans by a formal league, and were but few in number. Next to the *civitates liberæ et fœderatæ* were the *liberæ* which derived their freedom not from a covenant but from a law or a decree of the Roman senate. This was given (to use Marquardt's expression), "as a reward for their adhesion to Rome or their voluntary submission. Being tied to the policy of Rome by their privileges, they secured the influence of the Romans in a land as yet incompletely subjugated." \* And a motive for giving the privilege, no doubt, was to divide the land where they lay by an inequality of rights, so that the favored cities might dread any revolutions that would detach them from the conquering power, and the unity of the territory might be broken. The most essential of their rights were exemption from a Roman garrison, freedom from a land tax, and jurisdiction under their own officers and by their own laws; but they were generally bound to make certain payments to the Roman people. The *free and untaxed cities* were exempt from tribute; but another class of towns, the *civitates stipendiariæ* were subject to taxation at the discretion of the Romans. But even these were not entirely deprived of their old institutions, of a popular assembly, of magistrates elected by a domestic senate, and to some degree of their own laws; they were subject, however, to the interference of the provincial governors. These various conditions of the cities in conquered provinces—for the minutiae of whose rights the archæologists must be consulted—show that the Romans pursued varying plans of policy, on the whole leaving to the cities a greater or less enjoyment of their former self-government. The same appears from the lines of kings in Asia Minor, Judæa and the remoter east, who were allowed to continue at the head of their kingdoms

\* u. s. iii., I, 249.



for years after they submitted to the Roman power. Ægypt had a peculiar government under the emperors.

During the republic prætors were sent out at first to regulate the provinces. Afterwards, those who had been consuls or prætors were selected for this purpose according to rules of the senate, and either were designated to a particular province or drew lots among themselves to determine where they should go. Under Augustus, in the year 727 U. C., the care of the provinces was divided between him and the senate. To the latter belonged the very important consular provinces of Asia and of Africa—to which consular men were sent—together with a considerable number of others which were placed under men of prætorian rank. Most of these lands needed no military defence, and the provincial rulers deputed by the senate now no longer had regular military power in their hands. The emperor's provinces were in some cases such as needed men invested with military power at their head; all the governors of this kind were his agents and directly responsible to him. Their names of *præses* (a comprehensive term), of legate, of *procurator*, of *præfect*, have been mentioned already. The time of service varied at different times. A law of 703 U. C., = 51 B. C., fixed the time at one year; but Julius Cæsar in 708 extended it to two. Augustus returned to one, but *iteration* was now permitted in the senatorial provinces. In the others directly under the emperor there was no law save his will.

The account already given of the cities that were wholly or in a degree free, will show how much control the provincial governors had over the territories where they were sent. There were scattered abroad through the Roman world *publicani*, great farmers of the revenues, or their agents, commercial men, travellers, officials and others, who were Roman citizens. Over these the governors had jurisdiction according to Roman law, and concurrently with them, in civil cases, it might be, the officers of the community. If the person complained of was a Roman senator, the governor could



refer the case, without examining it, to Rome. In the senate's provinces jurisdiction was intrusted to the governor's legates, whose especial business this was; in those of the emperor, if there were no legates for cases at law, who usually attended on the emperor's legate, the latter with the help of his companions took this business into his hands. The criminal jurisdiction also belonged to the provincial governor, but as he could not inflict the penalty of death on a Roman citizen, the accused Roman could appeal to the people at Rome, or under the empire to the emperors. As for such as were not Romans it was for the governor to decide whether he would remit the case to the authorities at the capital or not. And in extraordinary cases, when delay might imperil the safety of the state, he might decide and inflict a capital sentence on a Roman, taking upon himself the risk. Furthermore the emperor's legates who commanded armies in their provinces had the *jus gladii*, at least in reference to military affairs, over Roman citizens. Such was the state of things under the early empire. But as citizenship began to be widely extended, it was in a manner necessary that the jurisdiction of the provincial governors should be enlarged. Hence in the third century, the jurisdiction in capital cases, which pertained in theory to the emperor and to the senate, was committed to all the governors, both of the senate's and of the emperor's provinces; but senators, members of councils in free towns, with centurions and higher officers of the army, could still appeal to the authorities at Rome.

The Roman proconsuls during the republic were under very little control, and oppressions of the provinces were not infrequent. When accused at Rome by deputations from the provinces, they were often shielded by the judges. Under the emperors there was more fear of punishment on account of oppression of the provincials; thus the provinces were more justly governed than before.

When the right of citizenship was offered to all the inhabitants of the Roman world by Caracalla, this measure had some effect in extending Roman law and supplanting local;

and Roman rights began to be universal, when they began to be worthless.

### § 204.

Among modern nations, those which have been most composite in their governments are Spain and Eng-  
Colonies especially Roman, Spanish and English. land. The former, before the great war of succession, was sovereign of Naples, Sicily, the duchy of Milan and the Spanish Netherlands, together with numerous dependencies in the eastern and western parts of the world. The latter, through her colonies, and her conquests of the colonies of others, became mistress of a large part of North America, of Southern Africa, of numerous islands in the eastern, western, and southern seas, besides acquiring by degrees the supremacy in a large part of India and a decisive control over Indian lands as yet independent; not to speak of adjoining eastern territory which has fallen into her hands, owing to her predominant position in India. After the treaties of Utrecht and of Rastadt-Baden, the territories of Spain in Europe outside of the Spanish peninsula, passed from under her jurisdiction. As for England under the Stuarts, there were two nations united under one king, with no other political union between them—England itself, including Ireland, and Scotland. The act of union, in 1707, joined England and Scotland together under one sovereign, and one parliament, but left to Scotland its own religious establishment, laws and administration of justice. Ireland was fully united with Great Britain in 1800, and thus the two islands became politically one.

The colonies of the two countries were sent forth on a greater scale than those of any nation since the days of Tyre and ancient Greece. The colonies of Phœnicia  
Colonies of Phœnicia. were the outgrowth of the commercial spirit, or of pressure at home owing to invasions of Assyrian or Babylonian kings. The absence of the political element in these settlements tended to make them soon independent of the mother-country; but, as we have seen, Carthage absorbed

again many of them into its system, always having commercial ends mainly in view. The first Greek colonies were composed of fugitives escaping from the effects of the Dorian invasion of Peloponnesus to the land where the Ionians of the same race were already settled. Later colonies were caused by conquests on a smaller scale, as the Messenians joined the people of Chalcis in their migration to southern Italy, when the Spartans had conquered their land. So also the Ionians of Teos and Phocæa left their homes on account of the Persian invasion, the former for Abdera in Thrace, the latter for Massilia in Gaul. Other colonies owed their origin to internal dissensions, or to the desire in oligarchies of getting rid of a poor class of citizens, or to commercial causes.\* The Athenian *cleruchiæ* were colonies sent to places inhabited by Greeks before, and often to revolted places which had been resubjugated. They derived their names from the portions or lots assigned by the Athenian community to citizens who wished to emigrate. The motives were the security of the reacquired influence and relief from over-population at home. The Athenian citizens joining these colonies were not expected ever to throw up their connection with the mother-country, and remained Athenian citizens. Most of the colonies were planted, to borrow a remark of Niebuhr, in places before unoccupied, unlike those which Rome sent forth; and into most of them a diversity of elements was received from the first. This, with the general tendency of the Greeks towards self-governing, independent, city-communities, led to separations of the colonies from the mother-countries, which had sent them out under religious auspices, and perhaps with public aid.

The Roman colonies, as we have seen, were chiefly of a political and public nature, like advanced posts in a territory not as yet thoroughly Romanized. But the Spanish colonies, and, in a degree, the English, had

\* Comp. Schöm. Gr. Alterth., ii., 81 onw., and K. F. Hermann, u. s., i., § 73, 86, where there is a rich collection of particulars. For *cleruchiæ* comp. Boeckh, Staatsh., book iii., § 18.

other motives for their foundation. Making a distinction between the motives of the governments sending out the colonies and of the colonists themselves, we may say that the governments were desirous of establishing relations of a commercial nature between the old countries and the settlers abroad for the benefit of the former. The colonists, on the other hand, had a diversity of motives. Among the Spaniards it was lust for gold which chiefly directed colonists to the Spanish conquests in the new world. Of the English, many sought homes in the wilds to carry out their religious convictions undisturbed. Others desired to benefit their condition by obtaining lands at a small price. A very few convicts were sent to the colonies by way of penalty. But the relations of the colonists to the soil and the natives, together with the plan of government, are the two important points where a mistake might be very serious, and where very serious mistakes were made. The Spanish colonies from a very early time were managed on a somewhat feudal plan of dividing up the land to settlers together with the Indians in the way of the old feudal commendation. (§ 169.) The *encomiendas*, considered as grants from the king of Spain, of soil and of the native inhabitants, and called also *repartimientos* or repartitions, were at first instituted without law; then in 1503 the laws of Spain made labor compulsory on the Indians and their caciques, and yet regarded them as free persons. A distinction may be made between simple commendation and the repartitions; but they came, as Mr. Helps remarks, much to the same result, and the natives regarded the condition to which they were reduced as a deprivation of freedom. This relation to the soil and the natives, beginning in Hispaniola, spread through the colonies. The natives perished under the system; and its cruelties, denounced by enlightened priests and monks, were thought necessary by the colonists. To save the remnant of the natives from extinction Africans were imported—the beginning of the woes from this source to the new continent. All the colonies of North and South America, without exception, we believe, received this system of *encom-*



*icndas*. But a number of laws were made for its mitigation or final extinction. In 1542, a law, prepared by a junta of important men in Spain, and accepted by Charles V., provided among other things that "after the death of the conquerors of the Indies, the *repartimientos* of Indians which had been given to them in *encomienda* in the name of his majesty, should not pass in succession to their wives and children, but should be placed immediately under the king, the said wives and children receiving a certain portion of the usufruct for their maintenance." Further, the men serving in a public capacity who held such properties should be obliged to renounce them. The *encomiendas* were now held in Peru for the lives of the original owner and his son; and it would seem that the colonists had the impression that the grandson also was to be included. When the new law was proclaimed it created very serious disturbances in that province. After the extinction of the rebellion, the president De la Gasca, framed an act of repartition of property, the rents of which are said to have been equal to the rental of a large part of Spain. All the lands given out returned to the crown after two lives.

In Mexico, Cortez made a provisional repartition, which was set aside by that of an *audiencia*, and their doings again were rectified by another. The law of succession (before 1542), at length provided for the management of the *encomiendas* for two lives and on a strictly feudal plan. But the complaints of the colonists against parting with their properties led to the prolongation by successive steps of the tenure of these estates to three and five lives in Mexico. In Peru the tenure ended and the properties reverted after the third generation. This system remained in force until after the middle of the eighteenth century.

The compulsory services of the Indians were abolished, after great efforts in Spain to do away with them, more than a hundred years after the occupation. The Indians employed in the mines were called *Mitayos*; these also could not be used in the service of individual colonists save for a time, and



in limited numbers. On the whole the laws of Spain breathe great humanity towards this part of the population.

The Spanish colonies, with great differences in regard to negro slavery, and to the treatment of the native races, were all governed by presidents receiving appointment from the king. It does not appear that the people themselves had any concern in their own affairs, unless in the details of municipal and village management.\*

### § 205.

The English colonies first planted in North America depended for their rights and privileges on royal charters, which were given usually to companies in Great Britain. The charters, as was natural in a land blessed for ages with municipal liberty, gave self-governing powers to the planters within the limits of English law, yet not to the full extent. In most of them, sooner or later, the governor was appointed by the crown, and could set aside measures of the burgesses in the general assemblies. In one, *i. e.*, in the colony embracing Pennsylvania and Delaware, a proprietary governor was provided for—that is, one chosen by the successors of the original proprietor named in the charter. In two the qualified citizens voted from the first onward for all their magistrates. In the towns municipal self-government followed in substance the example set in England. The colonies were all subject to the laws of the mother country in regard to trade, and a control was exercised by the home government over their rights to engage in certain occupations which would interfere with similar ones in the mother country. On the whole, however, nearly all the rights pertained to them which free communities ought to desire. This was their preparation for becoming a free, independent people.

The relation of these English colonists towards the natives or Indians was somewhat different from that which we have

\* For various particulars in what is said of the Spanish colonies, I am indebted to Mr. Arthur Helps, *Span. Conq. in America*, esp. to vol. iv.

found to exist in the Spanish colonies. To a considerable extent they purchased their land from the aborigines, and no attempts were made to enslave them that we are aware of. These natives, being in the condition of hunters of wild animals, were scattered about, and for a time mutual jealousies did not disturb their intercourse with the new settlers. When they came into conflict the English had the general advantage. Slavery was introduced at an early day into the colony of Virginia, nor did any of the colonies object to it afterwards for a long period. In the northern ones the products capable of cultivation did not call for many slaves. But the demand for slaves created by the products of the soil continually increased, in the southern, until a separation of interests and character arose between them and their northern neighbors.

The colonies in the West Indies, obtained to a great extent by conquest, and those in the more northern parts of North America, won from the French, have been brought into the same system which we have spoken of above. Local governors appointed by the crown, a council and a local legislature, are everywhere to be found. In the colonies to the north of the United States a successful attempt has been made to introduce the principle of confederation under the supremacy of the British sovereign in council. In one of them, French law is blended to some extent with English.

One dependency of Great Britain, or rather one circle of dependencies of vast extent and with a vast population, has had a most singular history, so far as its relations are concerned towards the British empire. We refer to the East Indian territory. A trading company, with a charter (1600) from a sovereign distant by half the earth's circuit, is forced by its position into conflicts with native princes. Forts in two or three parts of India become centres of power. The French are driven out of the country. The company not only acquires a control over a large part of India, but also can influence English politics. But, in 1784, by Mr. Pitt's bill, a board of control, appointed by the crown, was associated with the directors of the company. In 1858,

India as a dependency of Gr. Britain.

another bill relating to India transferred the control of affairs from the company to the crown. It contemplated the appointment of a secretary of state for India, with a council of fifteen assistants holding offices during good behavior, eight of them nominated by the crown, and seven at first by the board of directors and afterwards by the council itself. The right of free trade with India was some time before this opened to all English vessels. For a long time there had been three independent presidencies in India. From 1783, a governor-general, who was also governor of Bengal, brought a certain unity into the administration of the various parts where British supremacy was acknowledged. In 1793, Lord Cornwallis being then governor-general, a system was permanently set on foot in regard to the tenure of land, the land-tax, the middlemen, and the tenants,\* as also in regard to the administration of justice in that which was British India in the strict sense. The relations of Great Britain to the various states, as supreme, as a protector, as an ally, are too complicated to be described here.

The policy of modern nations in regard to their colonies has been to use them for the commercial benefit of the mother country, and to place them under institutions corresponding with the political tendencies there prevailing. The French colonies all passed over to the English. The Spanish separated from Spain to form free republics, with little experience of self-government. The vast Portuguese territory remains a monarchy with great prospects for the future. Only the English colonies have as yet shown a vigor and life, an intelligence and freedom which can compare with those of the Greeks. This result is due to the political institutions, and to the healthy tone of morals and religion in England; and promises to carry the human race forward more than any other political movement of modern times.

\* Comp. Mr. G. Campbell, *Tenure of land in India*, Cobden club's systems of land tenure, 149-233 (1870).

## CHAPTER VIII.

### CONFEDERATIONS.

#### § 206.

ANOTHER form of governments having a composite structure and of great importance can be comprised under the term confederations, or federal governments. Nature and kinds of confederation. There is a difficulty in drawing a line between this class of governments, and unions which are less close and have little or no central authority able to control the members. An agreement between two neighboring states—we will suppose them for the present to be small communities—may relate to a particular action, as a resistance to a common neighbor of greater power than belongs to either of them, or to a number of actions of the same kind, such as continued intercourse, like buying and selling in each other's markets, and crossing each other's territories, which rest on the faith of treaties. Agreements of the first of these descriptions cease when the action which they contemplate ceases; those of the other class are made either for a term of years, or have no limitation. Or, again, there may be leagues of two or more such states for purposes of mutual defence intended for all time, with a specification of the duties which are to be performed when the *casus fœderis* arises. This league takes from the free will of each, in a certain contingency, the power of acting as it otherwise might, but the parties may be in other respects entirely separate from one another. The agreement is then of the international sort. They may not even give and receive the rights of commercial intercourse. Here, then, as yet there is no federal government, although

there may be a perpetual league or alliance.\* A federal government implies much more. On the one hand, says Mr. Freeman, in his still unfinished work on this subject (p. 3), "to form a federal government each of the members must be wholly independent in those matters which concern each member only. On the other hand, all must be subject to a common power in those matters which concern the whole body of men less collectively." Thus, the two poles of a federal government are independent action of the members in certain things, and a central power or government which, in certain things, is equally independent. This central power or government of the federal union must, in the nature of the case, be the result of an agreement of the parts with one another; but, when founded, it no longer depends on the desire of any one member to continue in the union. From the nature of the case the central government is not created for a particular emergency, but for the attainment of perpetual ends. It might, indeed, be conceivable that such a government, or indeed any other, should expire by its own limitation after the lapse of a half-century, just as there have been terminable treaties of peace; but the central government has the same reasons for enduring which two countries like England and Scotland had in forming a union. From its formation, if it be a real government, that is, if it have a sphere of its own to act in like other states, and a power of its own like other states, it is an independent political entity.

How does the relation of such a federal government towards the states which are its members differ from the relations between a state and a municipality? The answer must be that in no sense is a self-governing municipality independent. Its charter, if it have any, or its duties and rights, as defined by a general law, proceed from state power, and may be modified for failure to fulfil its duties, or for great state purposes. It is simply within the competence of the

\* These words, it may be remarked, are from the same root, *ligo*, to bind; *alliance* from *adligo*, through the French *allier*, and *league* from *ligo*, through Fr. *ligue*.



state, through its judges, or it may be through its legislature, to decide whether the town shall longer enjoy its franchises which it has forfeited, or of which public necessity required the modification. But the states in a confederacy cannot control the central power, or put an end to it, except by unanimous agreement, or in accordance with the provisions of the compact; nor can the federal union affect the status or existence of one of its members, unless the member is endeavoring to overthrow the power of the union, in which case, by the courts or by force, the union can defend itself and the members who remain faithful.

A confederation, then, is one and many. It is one, in that the law and power of the union is supreme so far as all or certain external affairs are concerned, and so far as certain intercourse between the parties is concerned. The control in certain things, of which international law takes notice, and in certain things pertaining to the relations of the states to one another, belongs to the central government. Nearly all the relations of private individuals within a state, to the state or to each other, are within the jurisdiction of the state itself.

It must be confessed, however, that this description would cut off the right of some governments generally called federal to being considered as such, and would necessitate the use of new divisions and terms which would not be likely to be of much use in theory or in practice. For instance, it will be admitted probably by all, that the right of waging war with foreign nations must belong, if any right can exclusively belong, to a federal government. But suppose that no war could be declared or carried on without the consent of all the states or members of the union, or that they are by its constitution required to furnish each its fair contingent, while the union has no army of its own; would this be an imperfect union or no federal government at all? If we say that it would be no proper federal government, we should have to arrange the seven united provinces of the Netherlands under another rubric. If each were required to furnish its own contingent, while no power was lodged with the cen-

tral government to compel their fulfilment of their duties, we should have an imperfect confederation, like one of the forms of the Germanic body.

We shall not then attempt to draw very rigid lines nor to make nice definitions. The distinction, however, which the German writers have introduced into political science between a *staatenbund* and a *bundesstaat* is a very valuable one, the former word denoting a league or confederation of states, the latter a state formed by means of a league or confederation. In order to know to which of the two classes a given state belongs, we need to inquire only whether the political body in question has the essential qualities of a state or not. If it has the right to make war and peace, to send and receive ambassadors, to levy taxes, to hold courts, to protect and restrain its members so as to keep them within the fundamental law of the union, to interpret that law in the last resort, to have a legislature and an executive of its own, with powers answering to such a constitution; it is a state formed by the union of political bodies which were either states, or dependencies of another state or of other states. In the latter case the union was the result of a revolutionary measure, and state existence had not begun, until the revolution had finished its course by the acknowledgment of the union. In the former case the states renounced their independent existence as truly as two states would renounce theirs when they united permanently together under one sovereign and one law. As, however, the rights belonging to the *bundesstaat*, or state resulting from a confederation, may greatly vary between the extreme where the parts seem to be consolidated together, to the complete or almost complete destruction of the original parts, and the opposite extreme where the government of the union is in its power and influence exceedingly weak, it may evidently be difficult to decide whether a particular confederation belongs to this form or not. On the other hand, the *staatenbund* or league of states may approach very nearly to the state constructed by confederation, or may approach the loose condition of a mere alliance for

several purposes. This difficulty, however, resembles those which we meet in regard to many other constitutions of states. From one point of view they seem to belong to one form, from another, to another. Especially do mixed governments call up such questions.

Both these forms have figured in history, and will need to be looked at in their workings in particular cases, if we would discover their tendencies, advantages, and defects. It is the second form, however, on which we shall bestow most attention, partly because it is the form of government in the United States, and partly because it is something of a novelty in the world, and has been supposed to meet satisfactorily the wants of several modern political societies which are composite in their structure.

With regard to federal governments, and especially to those which constitute a state over states, we observe *first* that they are essentially more complicated than any other kind of government, and have peculiar difficulties of their own from the co-existence of states with a paramount state. Being an artificial construction formed by human thought to meet certain difficulties, they generally have not the benefits of experience that those states have which have grown up by successive steps, which have set up new institutions to meet new wants of society, and which are the results of long and often unfortunate trials. It is certain, for instance, that if the framers of the American constitution could have foreseen the immense patronage of the president, with all the subserviency and selfishness of parties which this power either creates or strengthens, they would have anxiously inquired how these great evils could be prevented, which now it is so difficult to cure because every party wants the same means of promoting its ends which others have had before it.

Again, the complication involves frequent mistakes, and is hard to be seen through. How much power has been given up and how much taken? What is the meaning of the federal instrument of government when it limits the state power? Is it to be loosely or strictly interpreted? Such questions

must give rise to a multitude of heart-burnings in particular cases, where a state legislates on matters in which other states of the confederacy have a concern, or in which the rights of individuals may be invaded. As an instance of this possibility of conflict, and of the wide-sweeping range of a few words in our federal constitution, I may refer to the provision in Article I, § 10, that no state shall pass any law impairing the obligation of contracts.\* Let any one examine the history of decisions in cases of appeal, where this little *clause* was brought in question; whether it affects state laws relating to executory contracts, express or implied, or to executed contracts, to officers, to licenses, to private and public corporations; or ask what is the obligation of a contract which may not be impaired, and what state laws impair it; and he will find a control most salutary, but sometimes most irritating in the series of cases where state law and the judgment of the supreme court of the union come into conflict. A state is liable continually to overstep its just power and to encroach on the power and rightful authority of the general government, and it may happen that the union itself by its law and the decisions of its judges may overstep the limits drawn by the constitution. In this case there is no remedy within the constitution, no remedy but dissolution. A dissolution again is more easy and natural in a confederation than in other political organizations, because a large part of the purposes of government are subserved by the particular states or members of the federal union, and the inhabitants seldom feel in their private affairs the power of the general constitution. Its necessity is not felt, because the advantages from it, such as the management of intercourse with foreign parts and between the states, when once it is established, seem things of course. To estimate them properly one ought to live where a multitude of little sovereignties have their own diplomatic relations, their barrier tariffs, their constant difficulties along the borders, or from complaints of internal injustice. Allegiance,

\* Comp. Pomeroy's Const. law, 348-413.



again, is divided between the particular state and the country or union, so that it ought to be strong in order to bear the strain of two cords pulling, it may be, in different directions.

Further, there will be parties created by a federal union itself, considered as a constitution, as well as by differences of interests in different parts of it, if it be a large country. The formation of the union may have grown out of needs which were different in different parts, so that all will not find that it affords them equal or similar protection. There must also be interests of production, dependent on soil and climate, which will not be reconciled or equally aided by legislation. One part of a country wants a tariff, another wants to be without a tariff. But a majority must govern. Hence, the minority, which may well be predominant in one quarter, may complain of the tyranny of another quarter of a common country.

It will not seem strange, then, that some writers should consider a federal government, owing to its nice balances in regard to division of power between the union and the members, and in regard to the conflicting interests of the parts, as a peculiarly delicate and almost unadjustable framework. "The federative system," says Mr. Guizot (*Hist. of Civ.*, *Lect. iv.*), "is one which evidently requires the greatest maturity of reason, of morality, of civilization in the society to which it is applied. Yet we find that this was the kind of government which the feudal system attempted to establish; for feudalism, as a whole, was truly a confederation." Without stopping to insist on the differences in these forms of polity, the resemblances of which Mr. Guizot does not point out, although well aware of them, we find his judgment to be most true in respect to the difficulty of establishing a federal system in a world of ignorance and brute passions. It is certain that when a half-barbarous independence prevails and the sense of order runs low, where men fight their own private battles and are a law to themselves, the states which they inhabit are equally independent and cannot submit to the restraining power of a central government.



Yet in such a union, in a *bundesstaat*—that is, a state formed out of states, there is not one sovereignty more, but there are many sovereignties less, and the supremacy is lodged in the federal union. This is what the instrument of our union means when it declares that “this constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby; anything in the constitution or laws of any state to the contrary notwithstanding.” If a law is thought to be against the constitution, it can be brought before the supreme federal judges and examined in that respect. If found by them to have justly emanated from the federal legislature, no state or state law or state power can affect its validity; and resistance to its taking effect within a state would call for armed force in the last extremity, and subject parties in armed resistance to the penalties of treason.

The question is a fit one to be asked: What are the conditions under which states forming federal unions can expect to be not unsuccessful? It may be answered in general that they must have those qualities or be in those circumstances where they can have a common feeling. *First*, then, a common language seems necessary. Countries united under one sovereign, with no separate state organization, can hardly be made one so long as they have dialects quite diverse. It was a serious obstacle in the way of union, when the legislature of the kingdom of the Netherlands, founded in 1814, had three different languages spoken in its halls—Dutch, Flemish, and French. This foreshadowed the disruption in 1830, as it intensified every prejudice and difficulty. *A common law* is also essential for a complete union—that is, a law so far common that all the principles of justice are equally recognized by all, and that all the inhabitants may feel that they can never go where what they regard their liberties may be likely to be invaded. *A common religion* is not so essential, and yet if the sections of the country differ in this respect so far that a faith pre-

dominant in one in another has hardly any votaries, this is one separating cause, which added to others may break up the union. On the other hand, if the same Christian denominations are spread everywhere, this will be a potent cause for continuing the union, for the intercourse of sects is a closer bond in a country than is generally imagined. *Again*, the same general conception of liberty and the same institutions have a great binding force. For us to live under English institutions, to have the municipal and special forms of rights that our ancestors had, facilitated our coming together very greatly. There was one institution, slavery, that divided us—not indeed at first so much as afterwards, when it was seen to be in violent opposition to our principles of liberty; and this wedge was strong enough to divide the republic.

How far small monarchies, or governments of various kinds near one another, speaking the same language, and having nearly the same laws, can be united in a permanent union of the more compact sort, may be made a question. We shall consider it when we come to the forms of the Germanic body. We only remark here that monarchies, especially if not of the more limited sort, will naturally dread parting with political power; they will prefer a league of states to a state formed out of a league, and under such a constitution will not readily consent to any great supervision being exercised over them, nor to the strict control of supreme courts set up by a league.

The earliest attempts to create some sort of federal union would naturally stop at giving to a central government or administration the least power consistent with the purposes for which the union was formed. For no existing state likes to part with power; and the city governments, accustomed to do all political acts by the immediate action of the citizens and through agents of their own, would be slow to trust other states—even states closely allied to them in language and institutions—with a check on their power, unless it were terminable at will.

## § 207.

The history of unions begins with a more remote connection or an alliance between neighbors of the same race ; and among such states there could hardly fail to spring up some understanding how their inhabitants were to be treated in each other's markets, what should be done with offenders escaping into the other territory, what reparation should be due for crimes committed by the people of each within the territory of the other. Man could not be true to his nature without some imperfect law of nations even in very early society. The fear of external foes would create more permanent and more express understandings. If the need of mutual defence were more than a mere passing one, this would help on the feeble beginnings of union. Religious festivals, the gathering of all the communities around a common shrine would cement the union, either because common religious rites formed a common bond to strengthen a political association formed afterwards, or because the political bond took hold of the religious nature and gave birth to new religious ties. All the ancient gatherings of tribes or states were cemented by the festivals of religion ; and on the occasions when the people met together, other usages might arise—fairs, musical and gymnastic contests, everything by which man expresses the joy of his nature when he meets with his fellows.

There were many such gatherings in Greece, of which we know a little and but little. Leaving most of them to the antiquarian and the scholar, we shall say a word or two about the most important. Several of them are called by the name of *amphictyonæ*, or meeting of those who lived in the neighborhood, answering in derivation very nearly to our Anglo-Saxon *neighbor*, *i. e.*, a cultivator in the vicinity.\* All such

\* From *neah*, near, and *gabur*, cultivator, from *buan* to till, to inhabit. *περικτίωνες*, used by Homer and only in the plural, signifies simply the neighbors. *ἀμφικτίων* and not—*ύων*, was probably the original form, still occurring from *κτι*—(*κτιζω*), to found, settle, build.

gatherings in Greece that are known, met at a common temple. In some of them we can trace no political object, in others such an object is apparent. In one or more we have a tradition that a strife between two states was put for arbitration into the hands of the states there gathered. Some were composed of a part of one branch of the Hellenic race ; while others belonged to several or to a large number of the members of the Hellenic body.

The Amphictyonic council so called by way of eminence, The Amphictyonic council. consisted of a number of small tribes which surrounded the temple of *Demeter* near Pylæ or Thermopylæ, in the district belonging to the Malians. In process of time this gathering was shared in by twelve tribes or peoples, all of whom can be traced to the neighborhood, with one or two exceptions. The Dorians must have been members of it before they invaded the Peloponnesus. The Thessalians, whom tradition speaks of as having come after the Trojan war, from the west, into the country called by their name, may have been later members of the union ; but when the great Ionian race became members, it does not appear. On the other hand, not all the Greek races took part in the meeting or council ; thus the Achæans of Peloponnesus, the Ætolians, Acarnanians, Dryopes, Eleians, had no membership, and during the period of history several of the members were dependants of the leading race in Thessaly. It was thus in no sense a panhellenic confederacy at any time of its continuance. Its origin must have been very remote, as is shown by the fact that its meetings were called *Pylææ*, and the orators sent to it as deputies, *Pylagoræ* (from Pylæ or Thermopylæ), whereas its main relations, in historical times, were with the temple of Apollo at Delphi. This seems to show that before that temple rose into its importance as the most sacred place in Greece, as the very centre of the Hellenic religion, the Amphictyonic meetings had existed. Its connection with Delphi was doubtless the main cause of its importance.

There were two gatherings of this body or of its represent-



atives from the states that were members ; one in the spring and one in the autumn. At both times, however, the meeting took place first at Pylæ, and in the spring meeting was adjourned regularly to Delphi. It consisted of a *βουλὴ* or council, and of an assembly of the people from the several constituent races who happened to be present. The council was composed of two members from the several races or nations, or twenty-four in all. Thus, at one time, Athens and one of the smaller city communities, belonging to the Ionians, sent deputies together, according to a rule of rotation which is not on record, although it is probable that the turn of Athens came oftener than that of its smaller sisters. The members of the council were called *hieromnemones*, or *officers to take care of sacred affairs*, a word of very early origin, perhaps referring to the guardianship over the temple and oracle at Delphi. With these officers, who seem alone to have had a vote, were associated the *pylagoræ* or orators, sent by the states to give advice and speak on the affairs of the council, and who were indefinite and variable in number. These were chosen at Athens by lifting the hand, and were (at one time, at least) three. The *hieromnemones* were appointed by lot either for a year or for a Delphic period. The nations in the council were thus equal in their vote, each sending two, "so that the *hieromnemon* from Dorium or from Cytinium had as much power as the one from Lacedæmon, and he who came from the Ionian state of Erythræ or Priene as much as the Athenian delegate." (*Æsch. de fals. leg.*, p. 280.)

*Æschines* the orator, to whom we are indebted for nearly all we know of the constitution or the Amphictyonic gathering and council (*de fals. leg. u. s.*, and in *Ctes.*, p. 405, onw.), says that an oath was taken by the confederate states in the old times that they would destroy none of the cities that had part in the council, nor shut them out from the use of their running waters either in war or in peace ; and that, if any member transgressed in this respect, they would make an expedition against it and destroy its cities. An additional oath



secured the inviolability of the sacred property at Delphi against attempts to plunder it.

All the agency of the council that appears in history is connected with the protection or the defence of the temple or of the consecrated ground. In the time of Solon and Clisthenes a sacred war broke out against the inhabitants of the plain below Delphi, for their crimes committed against the temple and the persons of some delegates to the council, which ended in the destruction of their towns and harbors, their own enslavement, and the setting apart of their territory as sacred soil, under a solemn curse, if it were otherwise used. The other instance, in which the council was concerned in measures of importance occurs at the beginning of Grecian decline ; and the council now became a catspaw, used especially by the advocates of the Macedonian policy in furthering the ends of Philip and stirring up strife between the states. About 356 B.C., at the instigation of Thebes, Phocian landowners were put under a curse and heavily fined on charge of encroaching upon the domains of the god. This led to the sacred war, in the course of which the Phocian generals took large sums from the rich Delphic treasury to pay their mercenaries. This long war led finally to the invasion and overthrow of Phocis by king Philip, and to his getting a foothold in southern Greece. (346 B.C.) Again we find a movement, in which the orator Æschines bore a part, for action of the Amphictyonic council against Thebes, one of the Bœotian Amphictyonic states, in order to visit on Thebes the subversion of Bœotian cities, which were protected by the oaths mentioned already. (de fals. leg., p. 280.) Lastly, the same orator informs us how he inveighed against the Locrians of Amphissa, who, in spite of the action of the council in the time of Solon, had rebuilt the harbor, and were collecting customs and cultivating the soil of the plain. The Locrian delegates to the council were in the act of proposing a decree to the council to fine Athens for setting up votive shields without the proper formalities, when Æschines roused the council and the people of Delphi against them, and a movement was made for driv-

ing them out of the sacred territory. These manœuvres led finally to the appointment of Philip of Macedon as general of the council, and the Athenians, in self-defence, making an alliance with Thebes, fought the battle of Chæronea the same year.

In the course of his narrative Æschines mentions an assembly convoked by the president of the council, "for that was called an assembly where not only the deputies, but those who sacrificed with them and consulted the oracle, took part." We may from this hint conceive of the council as originally consisting of a senate and a people.

The council thus did very little in the way of uniting Greece; it became a mere tool of an unscrupulous party in the last days of Grecian liberty, and was very inefficient in any way except on one or two occasions. And this inefficiency was owing mainly to the fact that the states represented there were, most of them, of little account, and the regular business of the council almost exclusively religious. Nor do the Athenians seem to have known much about it, since Æschines has to tell them the nature of its constitution, as if he were speaking of some foreign kingdom.

In the later confederations which sprang up after the division of Alexander's conquests, and in the downfall of Greece, the political element was predominant; the religious became of no importance. These leagues were not originally meant to be panhellenic leagues, nor was there then a revival of nationality. They are in their plan and their partial success among the most interesting studies of ancient political history; and what is remarkable, their origin and centre are found in states which, while Sparta and Athens flourished, were feeble cities of minor races—in fact were partly out of the Greek pale. This probably is one reason why they felt free to act. In earlier times it fell to Athens, or Lacedæmon, or Thebes, to initiate a policy. Now the leaders were taken away, and they were obliged to act for themselves.

## § 208.

The principal confederations of this period were the Achæan and the Ætolian leagues. I shall give the particulars only of the former.\* This was not the first of the later Greek confederations. In B. C. 371 Megalopolis was founded in order to unite Arcadia, and this measure did serious detriment to Lacedæmon. About the same time, Jason of Pheræ united all Thessaly for a time, but as a tyrant, not as the head of a political union. The Bœotian league, consisting at one time of fourteen cities, was quite ancient. But Thebes, which, as early as B. C. 424, had two votes in this body, and in 378, three, aspired to the supremacy. The constitution of the league seems to have been this: twelve presidents chosen annually, representing the twelve cities of a certain period (afterwards reduced to eleven), seem to have had equal authority, and four senates (Thucyd., v., 38) which had the entire power in the last resort, were the consulting boards. The league was dissolved in the Persian war, and restored by Sparta in 457 B. C., in order to raise up a centre of power against Thebes. The place of gathering was probably the temple of Athene Itonia near Coronæa, and there the Pambœotian festival was celebrated. The strife of oligarchy and democracy, the ascendancy of Thebes, the interference of Sparta, disturbed this league and made it of little importance in the later times of the Greek nation.†

The Ætolians, an insignificant people when Greece was in its glory, half Greek in their language and habits, with a country divided into cantons or districts, may have had a union of its tribes and cantons from quite early times; and

\* For Greek confederations, comp. St. Croix, *Anc. Gouv. Féd.*, and others cited in K. F. Hermann, i., §§ 177-189, esp. 185, n. 1; Schöm. u. s., ii., 101-114; Brandstätter, *die Geschichte des Aetol. Landes*, etc. (1844), and Mr. E. A. Freeman's *Hist. of Fed. Gov.*, vol. i., 1863, p. 77 onw.—a work which needs no praise.

† Comp. esp. K. F. Herm., i., §§ 179-180.

they maintained the spirit of independence even when the greater part of Greece fell under the control of the Macedonians. It was this spirit of independence which led them to form a more extended confederation, which was joined by their neighbors on the east, and by states in the Peloponnesus, in the islands, and elsewhere. The league decided in questions of war, alliance, and peace; it had a stated gathering once a year—at which, as well as at the extraordinary gatherings, all the citizens of the confederates were entitled to be present—and a council or senate of the league, which was a permanent institution. This senate seems to have borne the name of *apocleti*, and another board, the *synedri*, may have been a committee selected from it. What their power was, cannot be ascertained with exactness, but they felt themselves obliged to bring some matters of business before special meetings of the assembled confederates. The administrative officers of the league were elected in the regular autumnal meetings. At the head stood a *strategus*, who presided both in the general meetings and in those of the councils. Next to him ranked the commander of horse, and the secretary (*grammateus*).

The rude Ætolians did not well agree with the finer Greeks, and after their wars with Antigonos Doson and Philip (B. C. 229–220), taking sides with the Romans first and against them afterwards, were forced in 189 to make a league which virtually rendered them subjects of the Roman state.\*

The Achæans, driven from their homes in the interior of the Peloponnesus by the invading Dorians, expelled the Ionians from the northern strip of coast, and thenceforth, through the times when Greece was in its bloom, were a second-rate collection of city-states, twelve in number at first, lying aside from the main stream of Grecian movements. They represent the noble race who figure in the Homeric poems, and were for an uncertain length of time under the government of twelve kings, one of

The Achæan  
league.

\* Comp. Schömann, ii., 201–206.

whom was superior to the rest. After the kings, came moderate democracies without a noble class. They had some kind of league between themselves, but not so close a one as to prevent their taking different sides in the Peloponnesian war.\* When the Macedonians became predominant in Greece, the Achæans fell under their control, either receiving garrisons of that power into their cities, or obeying tyrants who were devoted to its interests. The league or union was intermitted during this time until 279, when the invasion of Greece by the Gauls, and the confusion in Macedonia, before Antigonus Gonatas secured his power, presented a favorable opportunity for its reconstruction. This was effected by the four most western of the cities, and was joined within five years by three others—Ægium, which expelled its Macedonian garrison, Bura, and Ceryneia, which were either freed from or forsaken by their tyrants. Three others,—all that remained of the twelve old states,—Ægeira, Pellene, and Leontium, came in somewhat later.† The latter was not a member of the old confederacy, and Ceryneia succeeded to the place of Ægæ.

The federal constitution in its new shape was formed about 274.‡ Like the members of previous leagues, the members retained their city assemblies and magistrates, and the same arrangement was of course maintained when other city-states were admitted into the confederacy; nor was there any reorganization of local districts subordinate to each state, but, as Mr. Freeman points out, the dependent cantons of states within the league had no direct share in its concerns. Yet they may have been *demes*, containing citizens with full rights, like those of Attica.

Mr. Freeman regards the league as a *staatenbund* and not

\* An evidence that the league subsisted at the time when Helice was overwhelmed by an earthquake, is furnished by Strabo, b. viii., 8, p. 385, a passage referred to by Mr. Freeman and others. It shows also that the people of Helice would not do what the *κοινὸν* asked of them by vote.

† Ægæ and Helice no longer existed. Rhypes was a small place; so was Olenus.

‡ K. F. Herm. says 280, i., § 188.



as merely a *bundesstaat*. As this is the most interesting point relating to the league except its brilliant history, which, however, does not concern us, we shall now endeavor to give the details of the constitution.

1. All external relations were committed to the confederation and its officers. This was essential to a tolerably compact *staatenbund*. Thus all questions of peace, war, and alliance, all diplomatic relations to foreign states, belonged to the league, its assemblies and magistrates. But the rule in respect to sending and receiving embassies was not strictly observed. Corinth, after its union with the league, received ambassadors from Rome (B. C. 228), like a sovereign city-state. And in later times there were not infrequent instances of legations from members to foreign powers; one of these missions, in B. C. 224, occurred with the consent of the federal body; others, without taking the trouble to ask for it. At length, in the treaty of B. C. 198, with Rome, it was provided that all embassies must proceed from the general *synedrion* of the Achæans. Admitting that this was but a confirmation of a previous rule, we find, already, a somewhat weak notion of what was required by the obligation of the confederate states, and no known effort to compel obedience. "But this agreement was of course broken," says Mr. Freeman, "whenever its violation suited Roman interests. Sparta, especially, and Messene—cities joined to the league against their will—were constantly laying their real or supposed grievances at the feet of the Roman senate." In the case cited by him from Pausan., vii., § 9, the body sent ambassadors to Rome to counteract those of the Lacedæmonians who belonged to their body. Think of the United States sending an embassy to Great Britain to oppose one from New York! Would we not suppose in such a case that, if there had ever been a league of the stricter kind, it was near its extinction?

2. As in all the earlier confederations with the constitution of which we are acquainted, the Achæan league had a primary assembly. Every citizen of all the towns, at least from the age of thirty upwards, could

External relations  
of the league.

Its primary assembly.

by right be present, to speak and vote. There was no census limiting the right of partaking in the assemblies, and in its first form, when the league embraced Achaia only, there was no fear of a democratic element ; for the distance to the place of meeting, from the more remote parts, or from the mountainous region, must have kept many of the lower class of citizens away. Dyme, for instance, the most western town, must have been more than fifty miles by the road from the sacred grove of Zeus Hamagyrus, near Ægium; where the stated meetings were held twice a year, just after the vernal equinox, and in autumn. Besides these meetings, extraordinary ones also were called, at first to the same place, but afterwards, when the confederation spread over other parts of the Peloponnesus, to other places outside of Achaia proper, as to Sicyon and Argos. A meeting held at Corinth, in May, B. C. 146, shows how unfit was a primary assembly in a populous town to take part in the affairs of a large community. The Roman ambassadors were received here with derision and tumult, "for there was gathered a crowd of operatives and artificers, such as never had been present before." (Polyb., xxxviii., 4.) In fact, the measures taken at this assembly led to a war with Rome, to the destruction of Corinth, and the final dissolution of the league soon afterwards. The Romans then altered the constitutions of the cities from the democratic to the aristocratic (or timocratic) form, and forbade the citizens of one town to own lands within the limits of another.

It was a project of Philopœmen (about 189 B. C.) to give up the plan of meeting constantly at the same place, and to require all the cities of the league to take their turns in receiving it. The assembly was held at Argos, and as an ordinary meeting was again held at Megalopolis afterwards, it is likely that this change was effected.\* It is probable that the gathering at a small city like Ægium, out of the way for many of

\* Schömann, ii., 109, doubts this, but Mr. Freeman proves it from Polyb., xxiv., 12, "for as if on purpose it happened that the Achæans were then again collecting together at Megalopolis *εἰς τὴν δευτέραν σὺνοδον*."

the non-Achæan states, was very inconvenient, and that the presence of the members at various places was regarded as tending to combine the parts together and to lessen any jealousy that might be felt towards the original Achæan founders.

The assemblies were dissolved at the end of the third day's session. The subjects which came before them were all those for which the league was founded, "peace, war, treaties with foreign states, legislative ordinances, elections of federal officers, courts in relation to offences against the union." Whether also controversies between states belonging to the league were brought before the assemblies, or a special court was organized for this purpose, we are unable to decide.\*

3. There was a standing senate which seems always to have been in session when the general assemblies were held, and to have met from time to time as their business required. On matters of less importance they could decide of themselves; things of greater moment were required to be brought before the assemblies. Of how many the senate consisted we are not informed. That they received pay for their services, like the senators at Athens and elsewhere, is not improbable in itself, but it is by no means established by Schömann's citation; in fact, Mr. Freeman, from the same place of Polybius, argues just the contrary. (Polyb., xxiii., 7.) In that passage ambassadors of Eumenes are spoken of as offering on his part "one hundred and twenty talents to be put on interest by the league for the purpose of paying the senators on account of the public meetings." This might be to relieve the states from the burden of contributing to their support, or it might be a new plan altogether. When it was made known to the assembly (*τοῖς πολλοῖς*) a person from Sicyon arose and said that, "while the gift was worthy of him who offered it, it was, when viewed in regard to the design of the offerer, base and lawless. For whereas the laws forbade any one, private person or magistrate, to take gifts

\* Schöm. u. s. ii. 110.

from a king on any pretext whatever, they were all together openly bribed by this offer, if they accepted it, which thus would be of all things most unlawful and confessedly shameful." These and other arguments led the assembly to reject the gift. Still another passage, in which Polybius (xxviii., 7) speaks of a general having spent a considerable sum of money on his office, shows that he had small pay or none at all.

All the cities were equal in having one vote each, as every nation belonging to the Amphictyonic council had two each. Equality of members of the league. Probably this was a common rule in Greek confederations, which the fear of the predominance of a large member would naturally suggest. It was also necessary, in order to prevent the citizens of the place where the meeting was held from outvoting those of many cities put together, and lest cabals for a particular object should call together the partisans of certain local schemes in great force. It was originally a very unequal method of obtaining expression of the general will, for there was no such large difference of population between the Achæan towns as to make it appear oppressive, and when the league was enlarged, the new members accepted it for such as it was.

4. The magistrates of the league were, a general at the head of affairs, ten *demiurgi*, also called vaguely Magistrates of league. *archontes*, whom Mr. Freeman calls the general's ten ministers, a secretary, an under-general, and a master of horse,—if indeed these two latter officers had anything to do with state affairs, and were not rather confined to military duties. What favors this latter supposition in regard to the general-in-chief is that when he died, the last preceding officer of the same name took his place. The relation of the ten *demiurgi* to the general does not clearly appear. The number *ten* points to the times of the formation of the league, when there were but ten cities, but it is by no means certain that the ten were always afterwards selected from the early members of the body. They seem to have had a very important part in proceedings, and were naturally chosen at the same elections with the other officers. That they, to-



gether with the general, had a voice in calling extraordinary meetings, appears from Polybius (v., 1 ; xxiii., 10). That unanimity on their part was not essential, is also established.

The general was the great man of the confederation, first in war, first in peace. The whole history of the

The general.

time in southern Greece revolves around men

who filled this office, such as Aratus, Lydiadas, Philopœmen. The general presided in the assemblies, and had the power to summon extraordinary meetings, at which only those subjects could be laid before the league for which they had been gathered together. The powers of the general and of the ten *demiurgi* in regard to the business to be brought before an assembly are not positively to be gathered from the ancient authorities ; but in one instance, where the question related to alliance with the Romans (Livy, xxxii., 22), while five of the ten declared themselves ready to bring that subject before the council and put it to vote, an equal number refused, on the ground that it was against a law either for the magistrates to refer, or for the council to decree, anything which was contrary to the Macedonian alliance. Here we have rules binding the presiding general and the board of ten in a special case, and this may imply that in general their action was more free. In the instance mentioned, that one of the five who refused to lay the subject of an alliance with the Romans before the council withdrew his opposition ; and the measure was carried, it would seem, against the law, much to the dissatisfaction of some states, which left the meeting before the votes were taken (Livy, u. s. ; comp. Freeman, § 15).

The general, according to Plutarch (vit. Arat., § 24, vit. Cleom., § 15), could not be chosen for two successive years, but could be re-elected one year after the expiration of his office, and so after any number of intervals. Accordingly, Aratus was elected about twelve times in observance of this rule, being when out of office in fact, as Plutarch expresses it, a magistrate.\*

\* Comp. Mr. Freeman's note at the end of his eighth chapter.



5. Of the powers of the senate, of the power to raise soldiers and money, of the laws relating to commercial intercourse, very little is known. We have already seen that there was a senate, but how it was constituted is uncertain, and it is only certain that like others in Greece it had the preparatory consultations in its hands for the meetings of the assemblies; and that decrees, declarations of war, and the like, were submitted to them, or originated among them, before being proposed to the assemblies. Thus it is said (Polyb., ii., 46) that the heads of the Achæan government resolved, after collecting the Achæans (that is, all the confederates, whether Achæans by name, Arcadians, or others), in conjunction with the senate, to enter into open hostilities with the Lacedæmonians. The power of raising money must in some way have belonged to the league, since it kept large armies in the field; but this seems to have been done by means of requisitions voted by the council in its meetings, according to a scheme of distribution agreed upon among the states. Polybius tells us that Aratus was unable to keep the mercenaries together because wages fell short in the war against Cleomenes. The western states of Achaia, therefore, despairing of help from the league, agreed together not to pay over the contributions due from them to the Achæans, but to hire troops for themselves, and in this way to defend their territory. They acted well for themselves, but ill for the confederacy, continues the historian; they should have made extraordinary exertions for their own defence, and paid their contributions over as usual (Polyb., iv., 60). Here we seem to learn that the system of enlistment for pay, which was common elsewhere in the later age of Greece, as among the Arcadians for instance, furnished them with their supplies in part, although native soldiers of the league, especially horsemen, are mentioned.

6. The subject of federal courts still remains, and we cannot doubt that there were such, if the analogy of other Greek leagues and even the practice of unconfederated Greek states is to be any guide for our opinion. But little is known of such courts, and whether a necessity

Federal courts.

was felt for provisions other than must have existed before the formation of the league, such as free access of complainants to a defendant's courts in another town, and courts of arbitration between states, may well be doubted. So much, however, is certain, that offences against the league, especially maladministration of men in public trusts, could be taken notice of and punished by the council—whether after trial, before the assembly or the senate, or some separate court, does not appear. The examples of such judgments which are to be met with occur in the later and worse days of the confederacy; nor are they entirely clear in their details. One instance is where, after the death of the Spartan tyrant Nabis (B. C., 192), the Spartans are forced to join the league, on which occasion it is said that the Achæans gave strict judgments against them, which seems to mean nothing more than that measures of some severity relating to them were adopted by the council at one of its meetings, and not by a court. (Pausan., vii., § 8, 5.) Not long after this the council imposes on certain disaffected Spartans the penalty of death. (Ib., vii., § 9, 3.) Again, about B. C. 150, on account of the affairs of Oropus (see Freeman, ch. ix., p. 688, onw.), Calliocrates accused the general Menalcidas of crime, when his year of office had expired—which last particular shows that the chief magistrate could not be prosecuted during office. (Pausan., vii., § 12, 2.) Another magistrate, the general of the year 149, having failed to take Sparta when this seemed to be practicable, was brought before the council on trial and fined in the sum of fifty talents, which he was unable to pay and went into exile. (ib., vii., § 13, 5.) This is all that I have succeeded in finding that relates to public trials: in all cases the council itself, or some component part of the council, listened to the charges and gave the verdict.\*

Such are the particulars of the constitution of a league, which arose from motives of self-defence, was  
Results of the league. pushed by its successes beyond its original humble and local plans, got involved in the affairs of Rome

\* A passage of Polybius bearing on courts will be noticed below.

and of Macedonia, and after sundry vicissitudes was dissolved in B. C. 145. Ought it to be called a *state* formed out of a league, or a mere league of states? In a noted passage of Polybius (ii., 37, end), the opinion of this eminent historian, a contemporary of its last days, and whose father was one of its best and most illustrious supporters, would seem to make for the propriety of calling it a *state*. He says that "while many had attempted in the past times to bring the Peloponnesians into a community of interests, and no one was able to reach this point because in every instance they endeavored to do it not for the sake of the common liberty but of their own power, the Achæan movement met with a different result. So great a unity was effected here, that not only the community of allies and friends was brought about, but they made use also of the same laws, and weights and measures and coins, and, besides all this, of the same magistrates, senators and *judges*; and in fact, Peloponnesus, as a whole, differed from a single city only in this, that its inhabitants were not included within the same surrounding wall, while all things else were the same and similar both in a public respect and for individuals in their different cities."

If we could persuade ourselves that this was an unexaggerated description, we should have to say that the relation of the central power to the cities composing the union was more like that of a state to municipalities than like any other union such as we find among the ancient republics. But it can be no other than an exaggeration, unless the author meant by the same laws, the same as far as their united interests were concerned; and, by the same magistrates, senators, and judges, common officers of this kind for political purposes. It is very natural to suppose also that a new intercourse sprang up among the states of the union, which of itself would assimilate them to each other in important respects. At the time of its formation there were tyrants in different cities, and it was natural that the league, which had put down those within its original narrow borders, should lend its aid to kindred movements, as its sphere became more

extensive. The states voted as such. No tyrant could have appeared to cast his vote for his city consistently with its constitution and objects. As for weights, measures and coins, they find their way of themselves, or it is easy for independent states to fix on a common standard. Unity in this respect is no proof of close political unity, as the conventions of the present day, made with this in view by states widely unlike in form and spirit, show with sufficient clearness.

We must, in view of all the history of the Achæan confederacy, rank it among the looser governments of that sort, and yet near the line which divides the two classes from one another. To the ancients it realized the idea of a close union, because it went so much farther in that direction than others had done before it, but it betrays its character by several marks. *First*, it seems not to have had the necessary financial or judicial powers. I am aware that here it may be said that if we knew more of the internal constitution and the laws, we might come to a different mind. This may be true, but nothing shows that the league had even the powers exercised by Athens, when she was at the head of the alliance of the sea-states, when she sent out her collectors to all the allies and enforced the payment of their quotas. As for the courts, the strong probability is that this part of the constitution was wholly in the background. Again, to some extent the confederates—those outside of Achaia at least—seemed to have regarded the obligation as not a very binding one. They come in and go out, as if the confederation was no more than a common treaty of alliance. Thus Sparta seceded in B. C. 189, and Messene in 183. The separate league of the western cities (B. C., 218) was dictated by necessity, yet it gives an indication, as we have seen, of the prevalent feeling in the oldest members of the union. They refuse for the time all payments of their quotas of money to the federal government. Mr. Freeman (p. 536) justly denies that this was *secession*, but calls it *nullification*. It was, however, more like the action of the governors of two of the New England states in 1812, when they refused on

Not a strict confederation.



constitutional grounds, as they interpreted the federal instrument, to put their quotas of militia under the command of the president. And it is worthy of notice that these measures of the federal governors were spoken of by the president, belonging, too, to the democratic party—as frustrating the authority of the United States and showing, if they were a correct exposition of the constitution, that the United States “are not *one nation* for the purpose most of all required.”

Again, how inconsistent with the notion of a federal republic is the treatment of Aratus by the league or its chief officers on more than one occasion. Thus, after the defeat of Laodiceia, in B. C. 226, the assembly voted “not to give him money for the war, nor to maintain mercenaries, but that if it were necessary to go to war, he must provide his own supplies.” (Plut. vit. Arat., § 37, in Freeman, p. 452.) And again, in B. C. 223, after the loss of Corinth, the assembly conferred on him absolute power, and had a guard of citizens granted to him for the defense of his person. (Plut., u. s., § 41.) Nor was he restrained in his unauthorized negotiations with the Macedonian kings.

The constitution of the Achæan league, then, would seem to have had no adequate powers for state action, and hence irresponsible power had to supply their place. From the cession of the citadel of Corinth in the year B. C. 223, according to Mr. Freeman, “the glory of the league passes away—the free and glorious league of so many equal cities acting by a common will; the league which had warred with kings, and had overthrown and converted tyrants, had now become a thing of the past.” And yet this was seventy-five years before its dissolution, and less than thirty from its first beginning to act an important part.

Are we not justified, then, in saying that, while the Achæan league was a step forward and put the power of joint action in confederations in a new light; it did not show the strength or the self-subsistence of this kind of government in a way to commend it to posterity. When it went beyond the



limits of the ten cities, it came into conflict with powers with which it could not cope, save by making dangerous alliances, and it flourished in an age when a mighty enemy from the west was at hand ready to swallow up every independent institution. It failed, *first*, because Greek political habits could not admit of such a form of polity on a large scale, if on any scale; *next*, because it was in a manner forced to outgrow its original institutions, and because these institutions were not well enough compacted; and *finally*, because they who hated at once the Achæan polity and Greek independence, were too strong.

A small confederation outside of Greece, in a comparatively secure and obscure position, deserves a passing notice, on account of its giving an example of a better type of confederation than had been contrived before. The account of it in Strabo (xiv., pp. 664, 665)—see Mr. Freeman, 208-217—is as follows: "The *systema* or confederation of the Lycians consist of twenty-three cities, which come together in a common council through their delegates at any city which they see fit to make the place of meeting. The largest cities have three votes each, those next to them in population, two, those in the third rank, one." Strabo mentions six cities as the largest, and probably these only have the three votes apiece.\* "The contributions and other services," he adds, "are in the same ratio with the votes. In a council a Lyciarch is first chosen, then the other magistrates of the confederation. Courts of justice also are appointed by common vote (or for common purposes). Formerly, they consulted on war, peace, and alliance, but, naturally, now that they are under the Romans, they can do this no longer. In like manner also judges and magistrates are chosen in proportion to the votes from each of the cities." This last sentence cannot mean that the town judges and officers were appointed in the general council, which would be contrary to all the analogies

\* With the help of coins, the remaining cities of the Lycian league can all or nearly all be made out. See Marquardt, *Röm. Staatsverwalt.* i., p. 219.

of free constitutions ; but either that the appointments made by the league followed the number of votes of each city, or that there were federal magistrates and judges in each, varying in number with the votes which it cast. The first seems to be the meaning. Strabo goes back to the choices made in the council, and adds as an after-thought, that the offices are distributed—naturally, excepting the Lyciarch—in such a way that every town should have its share according to its scale of population.

Here three things are worthy of notice : the absence of a popular assembly meeting at the same time with the council, which was a very bad feature of the Achæan league, but somewhat more endurable in a smaller district ; the varying number of votes in the council, which would certainly tend to allay jealousy and the fear of a hegemony within a confederation ; and the federal courts. The league continued under Roman supremacy until, in the reign of Claudius, A.D. 43. Lycia was constituted with Pamphylia into a Roman province. It seems for a little while afterwards to have had a new enjoyment of its freedom.

### § 209.

Passing over a long tract of time, we come next to the Germanic confederations. German confederations. This grew out of the German feudal kingdom with the imperial power attached, which was gradually weakened by its conflicts with the spiritual power, and by the concessions to the princes and other magnates. The election of the king, consequent on the failure of the Carolingian family, and the attempts of the feudatories and of the pope to prevent any family from becoming too mighty, greatly aided the approach of the princes towards territorial sovereignty which marked the German empire, after other parts of Europe were beginning to be nationalized under a central authority. In the thirteenth century the German realm was so disintegrated after the death of the last emperor of the Hohenstauffen family, that some writers call it no longer a feudal monarchy but a republic,

whose members, now in greater, now in smaller districts, partly possessed, partly sought for territorial dominion. "And to this disintegration with little or no power in the head, which Prof. H. Leo strangely calls a republic, he attributes the "manifoldness and depth of German culture." \*

We pass over the interval between this period and the reformation, which is marked by the accumulation of power and territory in the south-east of Germany in the hands of the descendants of Rudolph of Hapsburg, who was chosen German king on account of his insignificance. We pass over the causes which led at length to placing the crown, under the forms of election, on the head of successive members of this family; and also over the terrible strife, caused by a division of Germany between two hostile religions, as well as by the hope of the emperor to regain the powers which the princes had appropriated to themselves. The thirty years' war separated Germany still more; and we call the state of things which followed the treaties of Westphalia a confederation of the looser sort, a *staatenbund*, which, however, as was natural, retained many usages and ways of thinking pertaining to the old feudal times. The old German empire was, however, conceived to be still in existence. But there is justice in what Pufendorf says in his *de statu imperii* (1660), that it has come into such a shape "ut neque regnum etiam limitatum amplius sit, licet exteriora simulacra tale quid prae se ferant, neque exacte corpus aliquod, aut systema plurium civitatum foedere nexarum, sed potius aliquid inter haec duo fluctuans." †

The important points for us in these treaties are not the restitutions and satisfactions for injuries in the war, nor the adjustment of questions of religious property and confessional rights, but the few things which are said, in Art. v., § 53, of the peace of Osnabrück, and Art. viii. especially, on the relations of the princes and independent states to the empire.

\* H. Leo, *Universalgesch.*, ii., 250.

† I owe this passage to Mr. Montague Bernard, *Lecture on Diplomacy*, p. 53. Lond., 1868.

“The estates of the empire are to enjoy a right of voting in all deliberations on affairs of the empire, especially when laws are to be enacted or interpreted, war declared, taxes laid, levies or supplies for troops ordered, new fortifications built on public account within the territory of the estates, or old ones strengthened in their garrisons. Also when treaties of peace are to be made or other matters of this kind transacted, none of these things or any thing like them shall ever be done or allowed save by the free suffrage and consent within the diet of all the estates of the empire. Especially, however, the right of making treaties with each other and with foreign states shall be forever free, for their own conservation and security, to the estates, all and singular; yet so that treaties of this kind be not against the emperor, the empire and the public peace, and especially against this treaty; and they shall be made with a saving of the obligation by oath, whereby each estate is bound to the emperor and the empire” (Art. viii., § 2). By another article the emperor promises to hold a diet within six months after the ratification of the peace, and as often afterwards as public advantage or necessity shall require (§ 3). By another still, the free towns are confirmed in all their privileges. In order to produce quiet between Catholic and Protestant states, the principle is adopted of having an equal number of Catholic and Protestant assessors in the courts; and where the states cannot be considered as one body, so that those belonging to the two religions constitute separate parties, the majority is not to decide, but the two factions must come to an amicable arrangement as best they can (Art v., §§ 51, 52, and onward).

By these measures the two religions were equalized, the emperor's power was balanced or made null through the opposition of the members of the diet, the members of the diet were left free to make treaties with whom they pleased, and a Protestant head, counteracting the Catholic Austrian power, was rendered possible. The empire itself and the emperor became more insignificant than before. In the en-



suing history we find estates of the diet taking sides against one another in the affairs of Europe, and great wars waged in Germany between them or by them against the emperor. They were also encouraged, by the full power of treating with one another which the peace gave them, to check each other's political designs in the empire, as by forming leagues in which a large number of princes were united. Such was the *fürstenbund* planned by Frederick the Great in 1785, a little before his death, to prevent the exchange of Bavaria and the Austrian Netherlands between the Emperor Joseph II. and the next heir to the Bavarian dominions.\*

Germany, broken up by the peace of Westphalia more than it was before, was unable to withstand the power of Napoleon. In 1806 the confederation of the Rhine, withdrawing a number of princes in south-western Germany from the empire, was followed by the emperor's renunciation of his dignity, and the breaking up of the empire itself. The princes could appeal, as they went out, to the failure of the constitution of Germany to unite the different members of the body, and to the separation of the interests of North Germany from South, by the peace of Basel in 1795, between Prussia and the French republic. There was thus no German political union from 1806 until June 8, 1815, when the federal act was concluded by the plenipotentiaries of the princes and of the free cities then remaining, and was incorporated in the act of the congress of Vienna. This transaction constituted "a confederation in perpetuity, bearing the name of the German confederation" (*Deutsches Bund*). Its members were thirty-eight (afterwards thirty-nine) in number, and its organ a diet in which Austria was to preside. In an ordinary assembly there were seventeen votes, so arranged that eleven principal powers, including Denmark for Holstein, and the Netherlands for Luxemburg, were to have one vote each, while the remaining six votes were given to groups of the smaller states

Revived 1815. The  
Confederation broken up in 1806.  
federal act.

\* Comp. v. Ranke, *die Deutsche Mächte u. der Fürstenbund*.



according to their importance. "When fundamental laws were to be considered, or changes made in the fundamental laws of the constitution, or measures were to be taken regarding the federal act itself, or organic institutions or other arrangements of common interest to be adopted," the diet was to form a *plenum* or general assembly, in which every member had at least one vote; the six greatest powers four apiece (viz.: Austria, Prussia, Saxony, Bavaria Hanover, and Würtemberg); Baden, each of the Hessian states, Holstein, Luxemburg, three each; Brunswick, Mecklenburg-Schwerin, Nassau, each two. The question in which of these assemblies a matter should be discussed, was to be decided in the ordinary assembly and by a plurality of votes. This assembly was to have for its office the preparation of projects of resolutions to be submitted to the general assembly, and its decisions were to be by a simple majority; while in the general assembly a vote of two-thirds was necessary to reach a valid conclusion. "But in neither assembly, when the question related to the acceptance or change of fundamental laws or to organic institutions, or to individual rights or affairs of religion, was the simple plurality to be sufficient. The diet was to be permanent, and could not adjourn for more than four months." All the members of the confederation engaged to defend not only Germany as a whole, but also each federal state in case of attack, and mutually guaranteed all their possessions comprised within the union. It was made unconstitutional, when a "federal war" was declared, for any member to negotiate, or make an armistice or a treaty of peace with the enemy on its own private account; and while the right of forming alliances of every kind was retained, they bound themselves to contract no engagement directed against the safety of the confederation or of the different states composing it. They engaged also to make war on one another under no pretext whatever, but to submit their differences to the diet without resort to force. A plan of conciliation, and if this should fail, the prospect of a court of arbitration (*austrägalinstanz*), is held out as a thing of the future (Art. xi.). Other articles

relating to particular points need not detain us, except the thirteenth, which is, that in all the states of the confederation there shall be a constitution of estates (*stände*), which seems to prevent the possibility of reforms in particular states in the direction of equality of condition.

The federal act was short and incomplete. An appendix to it under the name of "a final act of the conferences held at Vienna to develop and consolidate the organization of the German confederation," after being discussed by representatives at Vienna in 1819 and 1820, was accepted by a *plenum* in a diet held at Frankfort in 1820, as a fundamental law, of equal validity with the constitution itself. This had been preceded by a congress of nine states, held at Carlsbad in 1819, where sundry defects of the constitution had been complained of. A part of the articles of this *schlussact* are taken up with defining the relations of the states, somewhat in a scholastic way. "As to its interior relations," such are the words of Art. ii., "this confederation forms a body of states independent of one another, but bound by rights and duties freely stipulated. As to its external relations, it constitutes a collective power, established on the principle of political unity." "The constitution is, by its very principle, indissoluble; hence, no one of its members has the liberty to withdraw from it" (Art. v.). New members can be admitted only by a unanimous vote. (From Art. vi.) "The plenipotentiaries sent to the diet are individually responsible to their sovereigns (Art. viii.). The general council or *plenum* is only convened in the cases mentioned in the constitution, and also for the declaration of war, the ratification of peace, and the admission of new members into the union. When it is doubtful whether the business is of such a nature as properly to come before the *plenum*, the ordinary council must decide the point (Art. xii.). Unanimity is necessary in the *plenum* when the vote relates to organic institutions; and if the decision is favorable the deliberations on details are to be held in the ordinary council (Art. xiv.). Other articles provide for the maintenance of peace within the con-

The final act.

federate states, and the settlement of disputes by a commission of conciliation or by a court of arbitration; for the aid to be furnished, and the way in which it is to be furnished to governments for the maintenance of internal order. Measures for the execution of the laws and resolutions of the diet are to be taken in the name of the entire confederation; and for this purpose one or two governments not interested in the affair shall be delegated to do what is necessary; the diet determining the number of troops and the length of time for which they are to be employed (Art. xxxiv.). The confederation possesses the rights of making war and peace, and of negotiation in general." Yet, in accordance with the object for which it is founded, it makes use of these rights only for its own defence, for the maintenance of German independence, and of safety from without, as well as of the independence and inviolability of each of the confederate states (xxxvi.). A number of articles relate to measures for defence, to legal contingents of the several states, to their right to do more than is thus required of them, if circumstances demand this. If a member is at war for possessions outside of the territory, the confederation remains a stranger to its movements (xlvi.). When the confederation is engaged in a foreign war, no state can make a treaty with the foreign belligerent (xlvi.). The diet has power to determine the amount of expenses—ordinary as well as extraordinary, to apportion these expenses to the several states, and to regulate and supervise the collections (lii.). Existing constitutions cannot be changed except in the constitutional way (lvi.). The diet is authorized to guarantee a constitution at the request of a member of the confederation.

It will be evident, from a consideration of these articles, that this instrument did not go much further in the direction of a close union than the German nation had gone before. The diet made no political treaty with foreign powers; it scarcely contemplated the possibility of a war between the states of the union; it did not supersede the relations of the separate states to foreign powers; it had no army aside from the contingents of the states, had a limited range of powers,

and an awkward way of enforcing them. Its courts of arbitration were never fully set up. In short, aside from the governments composing it, it was not an organization with self-defensive and self-perpetuating powers.

Tendencies towards union in Germany are seen in the customs-unions which grew up chiefly outside of the diet. It seems also that Prussia was desirous of a closer union than had been effected. Meanwhile, democratic opinions grew up in Germany, the revolutionary spirit of 1848 spread through the states, movements for political changes were set on foot outside of its meetings which it was too weak to oppose; and a "*vorparlement*" (March, 1848) and a parliament (May, 1848) having been convened, a new constitution was framed in 1849. The idea in this instrument was that of a *bundesstaat* with a legislative assembly of two houses, the lower house to be elected by direct votes, and a population of 70,000 to return one member. A chief of the empire was to have international relations in his hands and a suspensive veto, which three successive resolutions of the *reichstag* or diet could overthrow. The question of a chief produced division, and it appeared that some political men of high character wanted to have a federal union with no Austria in it. The king of Prussia was elected emperor, but declined the dignity. After long tinkering and attempts to put this constitution in a more perfect shape upon its legs, things went back to the old diet in 1851.\*

Meanwhile the difficulties had occurred between Denmark and Schleswig-Holstein, the latter of which two duchies, being German, furnished Germany with a right of interference, and a military execution was put in the hands of Austria and Prussia. In 1864 the king of Denmark by treaty renounced his rights over these duchies and Lauenburg, in favor of the Austrian and Prussian sovereigns—a strange affair with which the confederacy had nothing to

\* A succinct account is given of this by A. Nicolson, a secretary in the British embassy at Berlin, in his *Sketch of the Germanic Constitution*. (Lond. 1875.)



do. By the treaty of Gastein of 1865, Schleswig was to be controlled by Prussia, Holstein by Austria, and Lauenburg was to go to the Prussian crown on the payment of a price. These arrangements disturbed and displeased many German powers, and difficulties arose between the two powers themselves. Prussian troops entered Holstein; the diet voted to mobilize the federal army; the Prussian representative at the diet declared that the constitution of the confederation was dissolved, and Prussia declared that she withdrew from the confederation, demanding at the same time a plan of reform, which was in reality a division of Germany. It was plain that war was inevitable. Prussia had prepared for it, and the question was whether Austria should be predominant or be driven out of the union. The wonderful successes of Prussia and the peace of Prague, following the convention of Nikolsburg, all in 1866, separated Austria from the Germanic body, led to the incorporation of Schleswig-Holstein, Hanover, electoral Hesse, Nassau and Frankfort into the Prussian kingdom, and to the formation of the North-German confederacy. The South-German states formed no union.

This new confederation went into operation under its constitution in 1867, and was to a considerable extent a carrying out of the ideas of the Frankfort constitution of 1849. The presidency belonged to the crown of Prussia, with the right, in this character, of representing the union in international affairs, of declaring war, making treaties of peace, of alliance and other conventions, of accrediting and receiving diplomatic envoys, of nominating consuls, and of commanding the confederate army and navy. To this head of the body belonged also the right to convoke, open, prorogue and close the federal council, which was to have an annual meeting, and, whenever a third of the votes should demand, an extra session. The federal chancellor, named by the *præsident* or presiding power or by his substitute, presided over the council. To the *præsident* pertained the promulgation and execution of the laws. The states of the confederation which did not fulfil their duties



could be constrained by military execution which was to be carried out by the federal chief, *i. e.*, the king of Prussia, and could go the length of suspending or sequestering the state in question and its powers of government.

The federal council (*bundesrath*) was to consist of forty-three deputies, divided among the states of the confederation according to the ratio observed in the *plenums* of the former union: Prussia, with the states now incorporated into it, having seventeen votes, Saxony four, Brunswick and Mecklenburg-Schwerin two each, the rest one each. Every member cast its votes on a unity, and votes not represented nor instructed did not count. A majority was to decide, the president having the casting vote. In the standing committees, of which there were nine, two states besides the presiding one (Prussia) were to be represented, but each state had only one vote.

The *reichstag* or parliament was chosen by direct and universal suffrage, one member being returned for every one hundred thousand inhabitants, until an electoral law could be passed. It was to continue for three years, unless dissolved by the federal council, with the concurrence of the *præsident*; could not be prorogued for more than thirty days, nor more than once without its own consent; it judged on the legality of the elections of its members, made its own rules of order and discipline, and decided by a simple majority, provided a legal quorum were present. The members were irresponsible for their votes and speeches, and could not be arrested for a penal offence without the consent of the body, unless *in flagrante delictu*, or the day after the act. They were to serve without salary. On the dissolution of a diet, a new one was required to be chosen, and to meet within a short, definite term.

The competence of the diet, or *reichstag*, extended, with the concurrence of the federal council, to all matters not international nor political and reserved for the head of the union, which pertained to the common welfare, as customs and imposts for federal objects, weights, measures, coins, paper money, banks, patent and copy rights, commerce with non-

German nations, navigation, payment of consular representatives, roads, navigable routes for defence or other general interests, navigation of public rivers and duties collected on them, posts and telegraphs, arrangements touching reciprocal execution of judgments between the states, legislation on contracts, penal and commercial law, bills of exchange and civil procedure (where citizens of more than one state were concerned), the military and naval organization of the confederacy, medicinal and veterinary police.

Important articles relate to other subjects, such as federal finances, offences against the confederation, change of constitution, and relations with Southern Germany. The effective peace-force of the body is fixed until 1871 at one per cent. of the population as it existed in 1867, and each state is required to raise two hundred and twenty-five thalers for every one of its soldiers in the federal army. This is under the command of the king of Prussia as "federal chief of war." Changes in the constitution cannot be made without a majority of two-thirds of the votes represented in the federal council.

Under this constitution the North-German states entered into the war with France, and were joined in it by the Southern States still having no political union. At Versailles, representatives of the latter appeared to negotiate for admission into the northern confederation. The treaties of admission were laid before the diet in November, 1870, and were accepted in the constitutional way. To Bavaria several concessions were granted. It was part of the plan that the king of Prussia should receive the title of emperor, which, being offered to him and accepted Jan. 8, 1871, on the territory of France, a constitution for the *German empire* came into force April 16, 1871.

This constitution differs so little from the North-German of which we have just spoken, that a very short account of it is all that is needed. The presidency belongs still to the king of Prussia, who wears the title of *German emperor* (*Deutscher Kaiser*). The relation of the parties is that of a confederation (*bund*), yet the *bund* has the name of the German kingdom

(*Deutsches Reich*). For the declaration of war in the name of the kingdom, and for treaties with foreign states which involve matters belonging to the legislation of the kingdom, the consent of the federal council (*bundesrath*) is necessary. The parliament (*reichstag*) is still chosen by universal direct suffrages and by secret ballots. The number of votes in the federal council are increased to fifty-eight, Bavaria having six, Würtemberg four, Baden three, Hesse three. The number of members of the *reichstag* at the first, and until a change should be made by law, were to be three hundred and eighty two, of whom forty-eight belonged to Bavaria, seventeen to Würtemberg, fourteen to Baden, six to Hesse south of the Main. The two legislative bodies must meet annually, and the council must meet at other times when this is demanded by the votes of two-thirds of the members ; but the parliament or *reichstag* can never meet without the council. The propositions made according to resolutions of the federal council are presented to the *reichstag* in the name of the emperor, and are there supported or represented by members of that body, or by commissaries nominated for that purpose. The *reichstag's* term of service is three years, and a dissolution at an earlier time can take place only by resolution of the federal council and consent of the emperor. If it be dissolved, a new election must be held within sixty days, and a new house must assemble within ninety ; nor can this branch of the legislature be adjourned more than thirty days without its consent, nor an adjournment be repeated. The *reichstag* judges on the validity of its members, makes its own rules of order, chooses its president, vice-president, and secretary, carries a question " by absolute majority of votes," and has a quorum when a majority of the legal members are present. Its sittings are public, and reports of its proceedings, intended to be true (*wahrheitstreue*) are irresponsible. The members of the body are representatives of the collective people, and bound by no commissions or instructions. They are free from examination and arrest on criminal charge or for debt during the period of session. The subject-matters of legislation are

nearly the same as in the North-German confederation. The military service rests on every German, and cannot be discharged by deputy. The ratio of costs and troops is to be made equal among the states in the confederation ; at present the Prussian system is to be followed in most respects. The emperor is head of the army, and all the officers take the oath to him ; superior officers of contingents, and commanders of fortresses are appointed by him ; generals, and officers taking the place of generals, need his approval : but in other cases the states, *i. e.*, their princes or senates, appoint the officers of their contingent. The budget is annual and fixed by law, yet the supplies can, in particular cases, be granted for a longer period. In cases of extraordinary need, a loan or a guaranty can be authorized by law. Attacks made on the existence, integrity, safety, or constitution of the German kingdom ; as well as injuries and insults to the legislative bodies or to members of them, or to other constitutional organs in the exercise of their duties, are made punishable in each state, just as similar acts are punished which are committed against the state or its officers. Controversies between different states of the confederation can be referred, on request of one of the parties, to the federal council for adjustment, provided they are not of a private nature, and are thus capable of being settled by the competent tribunals. Constitutional questions, within those of the states which have not furnished themselves with courts for the decision of such cases, may be settled at the request of one of the parties in an amicable way by the federal council, or, if this cannot be brought to a successful issue, by a general law.

These two constitutions are a great step forward towards a firm and close confederation. Yet the dangers and defects in them both, in that of the empire, however, to a less degree than in that of the North-German confederation, are apparent. The principal are these : *First*, the predominance of Prussia, which, in the first of the two constitutions, by its seventeen votes in the *bundesrath*, with its influence over smaller northern principalities, could easily carry every measure which it



pleased. This would necessarily cause discontent and bitterness, and would lead either to resistance and a breaking up of the confederation, or to a consolidated empire. It is the old part acted by a large city-state like Thebes with the hegemony in its hands, or by Athens as ally and then mistress of the maritime states. The formation of the empire somewhat diminishes this danger. Bavaria, with the other South-German states and Saxony, have the same number of votes in the federal council as Prussia, and although it must ever take the lead, the opposition must be greater, and the fear of successful disruption must act as a motive. Consolidation now seems far less feasible. *Secondly*, the provisions for collecting an army and for raising money by taxation are not those of a *bundesstaat*, and at times the non-fulfilment of their duties by the states must create very serious difficulties. *Again*, it seems a serious defect that there is no supreme interpretation lodged in some tribunal, having its branches all over the "*Reich*," and empowered to hear and decide in all cases where the central power as such is a party. But it may be said that if such a court had been a part of the constitution, it would have been a creature of the emperor. This may be true, and this shows the difficulty of uniting a hereditary imperial power, lodged in the hands of the head of a great kingdom, with a real federal system. There can be no change. The Prussian policy must go on for all time until a break comes; and the more peaceful Europe grows, the harder it will be to keep together. As we have before remarked, all difficulties are intensified by the fact that this is not a union of states so much as of sovereigns. If it were otherwise, the policy (of Prussia, for instance) might change with a change of parties; but the sovereign's will is more under the control of personal and family ideas, than parties are under the control of party principles. We have, then, a kingdom governing the union of states, which is called the "*reich*," stronger than that of Charlemagne or Charles V., or than any Austrian empire; and this kingdom, while it is the strength of Germany against foreign attacks, must be the

controlling force within. If one of the United States were larger than ten others in its neighborhood, and was represented according to the same ratio in the senate, it would form a dangerous element in our constitution, although our state officers change continually, and the states have no armies, and have, to a great extent, one common character and common interests.

### § 210.

#### *Swiss Confederations.*

Switzerland offers another example of an experiment in the way of confederation, beginning with a loose league or union, and ending in a well-compacted republic. The league first arose in the wood cantons, Uri, Schwytz, and Unterwalden, which acquired, after the battle of Morgarten (1315), in a peace or truce several times renewed with the duke of Austria, a condition of qualified independence. The emperor Louis of Bavaria (1324), confirmed their liberties as against the house of Hapsburg; and in the course of a few years several other places came into the confederacy, Luzerne in 1332, the town of Zurich in 1351, Glarus and Zug soon afterwards, and the imperial city of Bern in 1353. Some of these territories, however, held an equivocal position towards their former sovereign, which gave occasion to violent contests. In 1370 the "pfaffenbrief," or decree relating to the priests, provided that all persons living within the limits of the confederation,—even those who were bound by oath to the duke of Austria,—should take an oath to the confederacy also; and that no one should be brought before a sovereign's court, except in matters belonging to a bishop's jurisdiction, but only before the tribunal in the district where he resided (1370). A few years later (1386) occurred the glorious battle of Sempach, which the league of the Suabian towns left the confederates to fight alone, and in which these peasants slew the duke of Austria,

and a large part of his nobles. After another defeat (1389) at Näfels, the league was acknowledged by the former sovereign house, which renounced all earlier jurisdiction, retaining only their hereditary and certain other revenues. Appenzell came into the union in 1411, and a fifty years' peace was made with the duke of Austria in 1412; notwithstanding which, when the duke was placed under the ban for his assistance rendered to Pope John XXIII. during the council of Constance, the confederates joined in the war against him; on the emperor's promise that they should hold all the territory they could wrest from him (1415). The looseness of the federal principle appears on many occasions: an early one was the civil war between Zurich and Schwytz, in reference to the county of Toggenburg, after the line of counts ran out in 1436. Both sought, by various means, to unite and incorporate this territory with their own, and Zurich did not scruple to make an alliance with Austria for this purpose; but the confederates were against her, and she was compelled to submit to terms.

In the fifteenth century the confederacy was enlarged by alliances with Freiburg, Solothurn (Soleure), Basel, and Schaffhausen (1501); and in the latter third of the century, the Swiss becoming involved, through the arts of Louis XI. of France, in wars with Charles the Bold of Burgundy, became renowned through Europe for their victories over his troops at Granson (1476), at Murten (Morat) nearly three months afterward, and at Nancy (1477), where the duke met his death. From this time they came into the practice of helping in the various wars of France, and of the emperor, especially in Italy, and treaties were made by separate cantons for this purpose. The early spread of the Protestant reformation divided the Swiss, led to civil wars—such as that in which Zwingli lost his life (1531) at Cappel, that of 1656, which the peace of Baden terminated, and to the war between Bern and Zurich on the one part and five Catholic cantons on the other (1712); in which the latter were obliged, as the price of peace, to give up their part of the sovereignty over the county of Baden

and some other districts. The defeated cantons, by an alliance with France, secured themselves against future attacks from their confederates. There was indeed no central government. The diets (or tagsatzungen) met only to attend to the affairs of territories held in common possession. Instead of one diet, two sat—a Protestant at Aarau, a Catholic at Luzerne. The only diets called general were those convoked to listen to propositions from foreign ambassadors which concerned more than one canton. In these cases the ambassadors were expected to pay the expenses of the delegates, and the delegates from the two religions sat apart, each party negotiating for itself. Nor were there any common representatives sent abroad, but each canton managed its external affairs through its own agent. In the interior of the cantons the same want of unity was manifest.\* That of Bern was governed by a town aristocracy; another was divided into parts, one of which governed the others; and large dependencies of the confederacy had no sovereignty whatever, but were controlled in the way mentioned above, by administrative commissioners. No confederation that did not soon dissolve has been more shackling. That the Swiss union did not dissolve was owing, not to political causes pertaining to the league itself, but to the ancient bravery of the inhabitants, to the difficulty of operations of war in such a country, to the unwillingness of the great powers that any one of their number should control it, to its poverty and neutral position like that of an island of mountains, on both sides of which entrances into Italy were held by more powerful States.

Switzerland was to some extent affected by the principles, as well as involved in the commotions attending the French revolution. The southern Italian-speaking dependencies of the Swiss union were in part incorporated in the Cisalpine republic, and Basel was deprived

\* Comp. Passy, *les formes de gouvernement*, 344 and onward, to whom we owe some of the expressions here used.



of part of its territory on the plea of rectifying boundaries. Quarrels arose as they have done since between Basel-town and Basel-country. A difficulty between Bern and the pays de Vaud (Lausanne) gave a pretext for interference to the French republicans, on the ground of an old treaty by which the crown of France had this mediating position. In the end the pays de Vaud declared its independence; Luzern, Schaffhausen, Zurich altered their forms of government, making concessions to the dependent people in the country. Several towns were occupied by French troops, the Swiss confederacy was pronounced to be dissolved, a Helvetic republic was manufactured (1798), popular sovereignty was introduced under a common government, and new divisions of the territory into eighteen cantons were made, without entire regard to former cantonal boundaries. To all this flood of changes the old cantons, where Swiss independence was born, offered a heroic but vain resistance.

There was no want of constitution-making at this period, and as little possibility of keeping a constitution once formed from speedy death. First appears a project of a constitution of March, 1798, which served with modifications as the groundwork of another sketched in April of the same year. This latter was prevented, by the outbreak of war between France and Austria in 1799, from taking root. It was suggested by the French in August, 1798, that the Grisons should be invited to form an independent canton. Another constitution of May 29, 1801, approved of by Bonaparte, then first consul, was acceptable to few in its political and territorial arrangements. It comprised the Grisons, united Thurgau with Schaffhausen, and made many other changes. Other constitutions succeeded, in Oct., 1801, Feb., 1802, and July, 1802, which had no vitality. At this time French troops were quartered in the country. On their withdrawal anarchy and civil strife arose, the smaller cantons wishing to go back to the arrangements of 1798, while Zurich and Bern were in a condition of armed conflict. The government was driven to Lausanne from Bern by armed insurgents from Aargau.

An assembly was called to meet at Schwytz to project a new constitution. Amid the discord, at French suggestion, a deputation of thirty-six favoring the new, and fifteen favoring the old, system of things went to Paris; and it was announced from the first consul that a new constitution must be based on the following principles: equality of cantonal rights; honest renunciation by the patricians of their former privileges; and that every canton must organize itself according to its own language, religion, usages, and interests. After long consultation between French commissioners and the Helvetican deputies, the constitutions of nineteen cantons and the federal act were united in a draft called an *act of mediation*, and handed over, in an audience, by the consul to the deputies; with distinct statements that if this plan should not succeed, nothing else remained but to compel its reception by force of arms or to unite the country to France. The instrument went into operation and continued until Dec. 29, 1813, when Napoleon had returned to Paris and Schwarzenberg's army had marched on France through Switzerland. At this time ambassadors from most of the older cantons, in a meeting at Zurich, declared that the federal constitution, as contained in the act of mediation, could continue no longer, and that the old union must be preserved. They unite in pronouncing that no relations of dependency inconsistent with the rights of a free people shall be re-established, and that the old *vorort* of the confederacy (the place having the lead in public affairs), Zurich, should be asked to take the lead until a more settled order of things could be established. Thus, what may be called the French readjustments of Switzerland came to an end. The constitutions, however, as they were modified in the Mediation Act, were not extreme in any respect, but rather expressions of the public will as it then was. Everywhere mature age or the possession of from two hundred to five hundred "Swiss francs" was a necessary qualification for suffrage. The old wood-cantons adhered to the Catholic religion. Not even were the governments by guilds in Bern and Basel overthrown.

The congress of Vienna made a declaration in 1815 (March 20), respecting the affairs of Switzerland; one <sup>New constitution of 1815.</sup> part of which was the introduction of Geneva, Neuchâtel (a Prussian principality at that time), and Valais (Wallis), into the confederation; and this received the consent of the confederates. The neutralization of Switzerland with part of Savoy, followed as an act of the same powers. (Nov. 20, 1815.) The federal compact between the sovereign cantons of Switzerland, then twenty-two in number, had been concluded on the 16th of Aug., 1815. This is a reactionary instrument. It fixes the rate of troops and taxes for federal purposes; gives every canton the right to demand defense against internal and external force; provides for the settlement of disputes between the cantons; prohibits them from making treaties which are to the prejudice of other cantons or of the league; puts an end to all dependent territory and exclusive possession of rights by a class of citizens; continues the old plan of having a *vorort*, and a *tagsatzung* or diet, to be composed of ambassadors, meeting regularly in the chief town of the *vorort* on the first Monday in July, with the burgomaster or schultheiss of the presiding canton for their foreman. This diet declares war, concludes peace, and makes all treaties with foreign powers; but for the validity of these acts, three-fourths of the votes of the cantons are necessary. In other matters of business an absolute majority decides. Military capitulations, and conventions concerning affairs of police or public economy, may be made by single cantons; provided they oppose no federal principles, nor existing league, nor cantonal rights; and they must also be made known to the diet. Ambassadors from the league may be sent to foreign powers when their appointment is thought necessary. In extraordinary cases the *vorort* may be invested with especial powers, and a committee can be appointed, composed of the officer of the *vorort* who is entrusted with the management of the federal affairs, in conjunction with other representatives of the confederation. In both cases two-thirds are necessary to give validity to any resolution.

This representative committee is chosen by six circles of cantons each in turn. The *tagsatzung* gives the requisite instructions to these federal representatives, and fixes the duration of their duties; which cease, of course, when there is a new *tagsatzung*. When this assembly is not in session, the *vorort* has the charge of federal affairs within the limits existing before 1798. The cantons of Zurich, Bern, and Luzern, in turn for two years each, take the presidency implied in the word *vorort*. Cloisters and chapters are allowed to continue, but are subject to taxation, like private property. The Helvetic national debt is acknowledged.

Between 1814 and 1816 most of the cantons revised or made over their constitutions. Meyer von Knonau <sup>Constitutions of Cantons.</sup> classifies these \* under ten heads, the smaller cantons six in number being *democratic*, Bern and Freiburg "*patricio-aristocratic*;" Zurich and Soleure, Lucern and Basel, "*aristocratic-representative*," the two former with considerable political weight given to their chief town, the latter with less; Schaffhausen and Geneva, representative, with some weight of the capital; the Grisons and Valais "*democratic federative*," etc. In 1831, after the overthrow of the old Bourbon dynasty, the constitutions were generally submitted to revision, and the changes were all in a democratic direction. But the federal constitution was not altered until the next great revolutionary storm which swept over so many countries of Europe in 1848.

This constitution of 1848 brings Switzerland near, if not <sup>Swiss constitution of 1848.</sup> into, the class of Bundestaaten. The cantons, it declares (Art. 3) to be sovereign, so far as their sovereignty is not limited by the federal constitution,

\* Cited by Pölitx in his *Europ. Verfass. seit 1789*, iii., 213. The third volume of this work is more than half taken up with the different federal and cantonal constitutions, until 1831. The federal constitution of 1848 which I have access to is contained in Ghillany and Schnitzler's *Manuel Diplom.*, ii., 385 and onw. The constitution of 1874, April 19, I have in M. Antoine Morin's *Précis de l'Histoire Politique de la Suisse*, V., 331, and onw. The three first volumes of this work were not at my command when this sketch was first written. Nor have I access to Bluntschli's *Staats-u.-Rechts-Gesch. v. d. Schweiz*.



and they exercise, as such, all those rights which are not transferred to the federal power. All Swiss are equal before the law, no relations of dependence can exist, nor privileges of place, birth, family or person (Art. 4). "The confederation guarantees to the cantons their territory, their sovereignty as limited by Article 3, their constitutions, the freedom and rights of the people, the constitutional rights of the people together with the rights and functions which the people has conferred on the magistrates (Art. 5). The cantons are bound to ask of the confederation the guaranty of their constitutions, and this is given, provided these contain nothing contrary to the federal constitution, if their form be republican, representative or democratic, and if they have been accepted by the people and can be revised, when the absolute majority of the citizens demand it." The cantons are forbidden to form political leagues and conventions with one another, but may enter into agreements in respect to matters of legislation, to judicial affairs and administration, which must however be laid before the authorities of the federal union; and these may forbid their execution, if they are found to contain anything that runs counter to the confederation or to the rights of other cantons. If they do not, the cantons concerned in these agreements are entitled to call on the confederation to give aid in carrying them into effect (Art. 7). The confederation alone can declare war, conclude peace, and enter into leagues and conventions, especially into such as relate to customs and trade with foreign countries; but the several cantons may make conventions in matters of public economy, police and neighborly intercourse with a foreign country, provided the same be not inconsistent with federal obligations (Arts. 8, 9). The confederation is not authorized to keep up a standing army, and no canton or part of a divided canton [like Basel, or Appenzell] can keep on foot more than three hundred troops, not including a *gendarmierie* (*landjäger*). (Art. 13.) The cantons must abstain, when disputes arise between them, from vindicating their own rights, and from arming for this purpose, and must sub-

mit to the decision of the federal power (Art. 14). Aid must be given to a canton in danger by other cantons which are apprised of it by the cantonal government, and in like manner by the cantons to the federal government when their aid is invoked (Art. 16). The army of the confederation, formed by the contingents of the cantons, consists of three per cent. of the Swiss population of each canton ; of a reserve half as large ; and in times of danger the remaining forces (the *landwehr*) of the cantons may be called out. The scale determining the quota of each canton must be revised every twenty years (Art. 19). The confederation has power given to it in Art. 20, to secure uniformity and readiness for service in the military forces. It is also authorized to build or aid in constructing public works (Art. 21), to found a university and a polytechnic school (Art. 22), to control customs and duties on objects imported, exported, or carried through the country—of which each canton is to receive four *batsen* or less than three cents for each inhabitant (Arts. 24 to 26). The cantons (Art. 32), can introduce no new tolls (Art. 31). The posts, roads and bridges, in maintaining which the confederation has an interest, the coining of money, weights and measures on the principles of the existing arrangements for this purpose, the manufacture and sale of gunpowder, belong exclusively to the legislative competence of the confederation (Arts. 33 to 39). All Swiss are entitled to settle in any of the cantons on certain conditions (Art. 41), and settlement gives all rights of actual citizens except that of voting in communal affairs and a share in the property of communes and corporations, etc. (Art. 41). Every citizen of a canton is a citizen of Switzerland, but no one can exercise his rights in more than one canton (Arts. 42, 43). “The free exercise of divine worship is secured to the acknowledged Christian confessions in the whole extent of the confederation. But it is reserved for the cantons as well as for the confederation to take the proper steps in regard to the maintenance of public order and of peace between the confessions.” (Art. 44.) The freedom of the press is secured, but the confederation

may punish the abuses of the freedom of the press so far as they are directed against the confederation itself and its public officers; and the cantons are authorized to make laws on the same subject, which, however, must be approved by the *bundesrath* or federal council (Art. 45). The citizens have the right to form associations which are not opposed to justice or dangerous to the political state. The cantons can legislate on this matter (Art. 46). The right of petition is secured (Art. 47). All the cantons are bound to put Swiss citizens (*Schweitzbürger*, or citizens of the confederation), in their legislation, as well as in their judicial proceedings, on a footing of equality with their own citizens (Art. 48). Judgments of courts in any canton can be executed in any other (Art. 49). Every person is entitled to his natural courts, and no special courts can be established (Art. 53). The punishment of death shall not be inflicted for political crimes (Art. 54). A law of the confederation shall regulate extradition between cantons, but there shall be no such extradition for political offences or for offences against the laws relating to the press (Art. 55). Foreigners who disturb the peace or safety of the confederation may be required to leave Swiss territory by a law of the confederation (Art. 57). The order of Jesuits and affiliated societies shall be admitted into no part of Switzerland (Art. 58).

The *bundesversammlung*, or the assembly of the confederation, is made to consist of two houses—a *nationalrath*, or council of the nation, answering to our house of representatives, and a *ständerath* or council of the estates, that is, of the cantons, answering to our senate. A representative can be sent from each canton for every 20,000 souls, and for a fraction of over 10,000. Every canton, and, where a canton is divided, each of its parts, is entitled to at least one (Art. 61). The elections are direct, in districts not consisting of parts of different cantons; and every male Swiss, twenty years old or upwards, is entitled to cast his vote, who is not excluded from active citizenship by the laws of the canton in which he resides (Art. 63). Every person who is qualified to vote, and is a

layman, is eligible to political office. The possession of citizenship for five years entitles a naturalized citizen to hold office. The house of representatives is renewed by election every three years (Art. 65). No member of one house can be also a member of the other, nor can any public officer chosen by the *nationalrath* be one of its members at the same time (Art. 66). This house as well as the other chooses from among its members a president and vice-president, but the president cannot be eligible to the same office or to that of vice-president for the next regular session (Arts. 67 and 71). The *ständerrath* consists of forty-four deputies of the cantons, each sending two, and is paid by the cantons themselves (Arts. 69-72), but the members of the national council are paid out of the national treasury.

The powers of the legislature are for the most part sufficiently defined by the definitions of the powers of the confederation already enumerated. They together fix the pay of magistrates and officials of the confederation, create officers, and determine the salaries pertaining to them; their sanction is necessary for treaties and conventions with foreign lands, and they must accept the conventions of cantons mentioned above, before these can have force. But such conventions come before these houses only when the executive or a canton has an objection to make against them. They have an oversight of the administration and judicial affairs of the confederation. Such disputes between cantons as have an international nature, come before them. It is competent for them to say whether a subject belongs within the sphere of the confederation or that of a canton, and whether a matter falls within the province of the council of the confederation or of its court. In the elections which they are entitled to make of persons to fill the council, the court, the chancery, or higher military offices, etc., the houses vote together, under the president of the *nationalrath* as their head; and an absolute majority of the two houses decides. The same joint meetings are required when pardons are granted, and when the question of competence as between a canton and the confed-



eration is to be settled (Arts. 73-80). Each house has the initiative, and each member and the cantons are authorized to propose subjects by means of correspondence (Art. 81).

The *bundesrath*, or executive council of the confederation, consists of seven members who are chosen for three years, by the houses as was said above, out of all Swiss citizens eligible to the national assembly; but not more than one member can come from any one canton. The members are paid out of the treasury; they can engage in no other pursuit, nor hold any other office during the term of their councillorship; they have a president and vice-president annually chosen by the two houses; they can appear before the houses and give their opinions or make propositions there; and must have at least four members present in order to do business. The president of the council is not re-eligible for the next year, either as president or as vice-president; nor can the vice-president fill his office two years in succession (Art. 83-Art. 89). The duties of the executive council are enumerated in Art. 90, but need no especial mention for the most part. In times of pressing necessity it is authorized, if the two houses are not in session, to raise the requisite number of troops, and to give orders concerning the disposition to be made of them, subject to the immediate call of the houses, provided the number of troops called for exceeds two thousand men, or the summons is for longer than three weeks (Art. 90, § 11). The council is divided into departments (committees) in order to forward business (Art. 91).

The federal court, assisted by a jury in criminal cases, consists of eleven judges with as many deputies or assistants as the houses shall order. They are chosen by the houses for three years; and every Swiss is eligible who can be a member of the national assembly. They judge, in questions not international, between cantons and between the confederation and a canton; in questions between the confederation and a private person or a corporation, if the latter are complainants; and if the subject of the complaint is of considerable value, the lower limit of value being subject to the decisions

of the legislature. They decide also in respect to cases touching the status of persons who have no residence (*heimathlosigkeit*). In the cases where questions between cantons, or between a canton and the confederation, come before them, they come on reference from the council of the confederation. If the council decides negatively as to whether a matter ought to come before the court, the houses have the final determination on that point (Art. 101). Other cases of considerable value—the limit to be assigned by the houses—may be brought before them by consent of the parties at issue, who are then to pay the entire costs. The trials with a jury by the federal court, touch cases where officials are handed over for trial by a federal authority; those where high treason against the confederacy, or revolt and violence against its magistrates, are to be judged; international crimes and offenses; political crimes and offenses, causing disorders which have given occasion to an armed intervention of the confederation. In these classes of trials the legislature only has the right to grant amnesty or pardon (Art. 104, etc.).

This constitution seems to be needlessly particular, showing the mind of the German race therein; and it has some serious faults—such as the absence of an independent confederate army, the want of a head to the executive, the permission to the cantons to treat with foreign states in regard to certain less important relations with neighbors outside of the confederacy, the restrictions on the taxing power; but, on the whole, it is a constitution with excellent adaptation to a people like Switzerland, which, on account of its neutralization, needs no proper standing army; and it is dictated by a sincere and wise aim—to secure a government of sufficient strength, yet not calculated to alarm the jealous cantons, whose whole history has been shaped by the endeavor to protect their independence.

The constitution of 1848 continued in force until 1874.

Attempts to revise  
the Swiss constitution.

Projects to revise it, partial as in 1866, when of nine articles changing the instrument of government two only were adopted, or entire as in 1872, were pro-

posed. This project, when submitted to popular vote after having been first discussed by the chambers in 1869, was rejected by a slender majority of 5,511, and by thirteen out of twenty-two cantons; the Catholic cantons and the canton of Vaud (Lausanne) being decidedly opposed to it. The project tended too much towards centralization ("unitarisme") to please the older and smaller cantons, and the new matter bearing on religion was not suited to please all Catholics. There was also a plan, ugly-looking and in principle false, although not very dangerous, of a popular veto introduced into the constitution to the effect that "federal laws and resolutions, not urgent in their nature, are submitted to the people for their adoption or rejection, if the demand to have this done proceed from 50,000 active citizens, or from five cantons." In regard to matters of religion the federal council (bundesrath) proposed the following article: "Liberty of conscience is guaranteed. No one can be disturbed in the exercise of his political and civil rights on account of religious opinions, nor be constrained to perform a religious act. No one is bound to pay imposts, the product of which is appropriated to the expenses, properly so called, of a religious confession or corporation to which he does not belong." By this article, if adopted, a canton could no longer oblige a citizen to baptize his children, nor to submit them to religious and confessional instruction, nor make them go to the first communion; the citizen who refused to perform certain religious acts could no longer be put under a guardian; every one could marry without religious forms; he who would not take an oath could neither be punished nor excluded from civil employments.\* As a sort of compensation, ecclesiastics could be chosen into the chambers from which article 64 of the constitution of 1848 excluded them. But the Catholic feeling and a dread of too great power in the federal constitution were sufficient to cause the rejection of the revised instrument; and the first cause acted with the more

\* Remarks of A. Morin (u. s., iv., 226).

vigor, because the Vatican council had been so recently held.

In 1874, however, a new constitution was actually carried through by fourteen out of twenty-two cantons (the five old Catholic, Freiburg, and the Italian, Valais, and Tessin, alone voting against it), and by a majority of 142,000 voters out of 538,000 in all. This constitution is in all essential respects identical with that of 1848. A few differences or additions deserve notice. In Art. 27 of the constitution of 1874, the additions are made that primary instruction, which must be "sufficient," and be placed under the direction of the civil authority, is obligatory, and in the public schools, gratuitous. The public schools must be opened to the adherents of all confessions, without their suffering in any way in their liberty of conscience and of faith. The confederation will take the necessary measures against the cantons which do not satisfy these obligations. In Art. 30, the cantons of Uri, the Grisons, Tessin, and Valais, receive on the score of their international mountain roads an annual indemnity of more than half a million of francs, and for the clearing off of snow from the St. Gothard, Uri and Tessin some 40,000 more in all. This might be right enough; but it must have been intended also as a *douceur* to secure votes for the constitution. If so, it failed of its object in part, for three of these cantons gave very strong majorities against that instrument. The payments, however, depended upon faithfulness in attending to the routes in question (Arts. 30, 37). The article proposed in 1869, of which we have spoken above, is in part incorporated (Art. 49, end). The Jesuits and other religious orders are placed under a stronger hand than in the constitution of 1848. They and affiliated societies cannot be received into any part of Switzerland, "and all action in the church and the school is prohibited to their members." This prohibition may be extended also in the shape of a federal resolution to other religious orders dangerous to the state, or which disturb peace between the confessions. "No new convents or religious orders can be



founded, nor shall those already suppressed be established anew" (Arts. 51, 52). The death-penalty is abolished (Art. 65). The laws passed by the federal chambers or councils are proposed to the people for their acceptance or rejection, if the demand is made by 30,000 active citizens or by eight cantons. The same step may be taken in regard to federal resolutions which have a general bearing, and are not urgent in their character (Art. 89).

The Swiss federal constitutions all seem to dread placing power in the hands of one man. There is no president, properly speaking, although the presiding officer of the *bundesrath* is called president of the confederation. Appointing power falls chiefly to the two legislative bodies, and, happily, in so small a country this power can not be a dangerous part of the political system. Several branches of legislation are taken away from the cantons and given to the federal legislature, which under our constitution are retained by the states. Such are the laws involving control over telegraphs, the manufacture and sale of gunpowder, the right of marriage (including, it must be, the questions relating to divorce), and sanitary legislation. Bankruptcy is exclusively within the province of the federal laws. The plan of giving legislation to the general government in matters of a general, almost international character, such as marriage, guardianship, divorce, etc., is excellent and might be carried further, so as to include all the branches of international private law. On the other hand, the withholding from the federal government of an effective military power seems to be a great weakening of its attributions.

## § 211.

### *The Dutch United Provinces.*

The instrument which brought together the seven united provinces of the Netherlands was the union of Utrecht union. Utrecht, contracted by deputies and representatives from the estates of the duchy of Guelders and the county of Zutphen in Guelderland, by Holland, Zeeland,

Utrecht and the Ommelande between the Ems and the Lauwers, on the 23d of Jan., 1579.\* The rest of Groningen and Overijssel, with Drenthe joined the confederacy afterwards. They form a perpetual union, as if they were one province, without separating in any way or by any means. All privileges and customs are left untouched. Differences between members and towns of the union are to be adjusted by ordinary justice, and in an amicable way (Art. 1). They agree to aid and succor one another even to the shedding of blood in the war against Spain (2), and any other potentate (3). Fortifications at the expense of the union are to be erected by the *generality*, or meeting of deputies of the provinces (4). Particular taxes are granted for the union's expenses, such as those on beer, salt, wool, grinding flour, cloth, etc. (5). A census of the inhabitants between the ages of eighteen and sixty is soon to be taken (8). No truce, peace, war or imposts affecting the *generality* of the union can be lawful, save with the common advice and consent of all the provinces. In other matters the majority shall decide, which is to be ascertained as now in the *generality* of the estates. If there should be disagreement between the members of the union, the governors shall bring the parties to a common mind, or, if they find themselves unable to do this, shall call in the aid of assessors, and the parties shall be submissive to the decisions thus effected (9). No province, town or member of a province can make any confederacy or alliance without the consent of these united provinces and of their confederates (10). Others may be admitted into the league by the common advice and consent of all the provinces (11). A plan of coinage for all the provinces is soon to be arranged (12). In matters of religion Holland and Zeeland are to act their pleasure. The religious peace made by the Archduke Matthias with the advice and consent of the states-general of the provinces, of which he was governor and captain-general,

\* The act may be found in Dumont's Corps Univ. Diplom. iv. in Dutch and French. The district of Drenthe never came to be an independent state (H. Leo, ii. 805), nor did North-Brabant.

shall still continue in force, or they can make other arrangements such as they may think best (13). Conventual and ecclesiastical persons are not to be interfered with in the enjoyment of their goods. Alimentation and support are to be given to persons retiring from the convents on any reasonable ground (14.) Differences affecting all the provinces alike are to be settled on the plan mentioned in Art. 9. In other cases governors and their lieutenants shall adjust the disagreements (16). Should the course of justice in a province be obstructed, the other confederate provinces shall aid in a restoration of judicial order (17). No impost shall be laid in any province to the prejudice of another without the consent of all (18). Written summonses are to be sent to all the provinces, mentioning the business unless it be secret; and the deputies are to convene at Utrecht. The absence of deputies from members of the union is not to prevent the passage of business. The absent are to be warned that, if not present by a certain day, they will lose their vote (19). Members are expected to give notice to those who shall have authority to call meetings of the united provinces, of the business which they desire to bring forward (20). The governors and lieutenant-governors are to swear to observe all the articles of the confederation (21). A similar oath is required from all brotherhoods and burgher-companies in all cities and villages (*vlecken*) of the union.

In explanation of Art. 13 it is added that the provinces are ready to receive any Roman Catholic towns and provinces adhering to their religion, yet acceding to the league in other respects. The stipulations are signed by the deputies of Guelders and Zutphen [to which the French translation of the instrument adds, by Count John of Nassau, their governor, for himself, together with the other deputies in the name of the nobles of Guelders and Zutphen—nothing of which is in the Dutch copy], and by those of Holland, Zeeland, Utrecht and the Ommelande. Other provinces or parts of provinces signed the articles of the union afterwards.

This very imperfect constitution was devised as a means of common defense, and not without the hope, it would seem, that some of the southern provinces would give to it their adhesion. It had scarcely any executive machinery and no general head. And when we consider that each province instead of being a unit itself, had estates of its own, consisting, like the other feudal territories of mediæval Europe, of a nobility holding fiefs, of towns, and of a few religious corporations, the complications which might bring harm to the union were very serious, especially since the war with Spain was still in its progress, and the relation to the southern provinces were uncertain. In order to supply one want of the constitution a *land-raed*, or general council, was constituted, consisting of thirty members, apportioned among the provinces and receiving their appointments from the estates of each. Their consent was necessary in making foreign treaties, but they were not to offer opposition to the arrangements which had been begun with the Duke of Anjou, in regard to becoming the sovereign of the united provinces (Jan. 13, 1581).\* In a subsequent meeting at the Hague (July 26, 1581), independence was declared and allegiance to the Spanish crown was formally abjured.† The provinces of Holland and Zeeland

\* Motley, Dutch Repub., iii., 501—Can H. Leo in his *Niederl. Gesch.*, ii., 649, speak (?) of the same council, when he makes it to consist of thirty-one members, some of whom were from Brabant and Flanders, others from Holland, Zeeland and Utrecht, which, I believe, were not concerned in the proceedings.

† In this act of abjuration it was said that the people were not made by God for the prince, but the prince for the benefit of the people, as a father for his children, etc. It may be worth our while to quote Prof. Leo's outburst of anger against this harmless declaration of an almost self-evident truth. "It is a completely stupid question whether the prince exists for the people or the people for the prince, —a question so stupid that every one who enters into it from any side [as being a truth] can only bring out stupidities." Mr. Motley's sober words (iii., 509, u. s.) are that "these fathers of the republic laid down wholesome truths, which at that time seemed startling blasphemies in the ears of Christendom. All mankind know—said the preamble—a prince is appointed by God to cherish his subjects,



wished to confer on William of Orange the entire sovereignty within their borders, as long as the war should continue, including supreme military command with power of military appointment, and (with consent of the estates) the appointment of financial and judicial officers. This new and enlarged stadtholdership was accepted by him July 5, 1581. The election of Anjou took place the same year, but he did not arrive in the provinces until Feb., 1582.

The duke of Anjou failed most miserably, and after retiring into France, died in 1584, the same year in which William was assassinated. The same motive which led the provinces to choose a supreme chief from a rival of Spain, now led them to seek the alliance of England. The earl of Leicester, who was invested with the authority of stadtholder-general, showed almost equal incapacity with Anjou, and by his policy of favoring the democratic element which was attached to the house of Orange, seems to have raised up that spirit of jealousy within the states-general towards the chief executive, which was so important an element in Dutch history afterwards. He died soon after the ruin of the Spanish Armada in 1587, a defeat which was the great fruit of the Dutch alliance with England.

The difficulties between the states general and Leicester, when he first went over to the provinces, will illustrate where the point of weakness in the constitution, and of possible conflict, would be likely to appear afterwards. The states general offered him *complete or absolute* power, but understood, as it appears, *power without limit of time*; and expected that he should act under advisement of a council, and of course respect the liberties which the provinces had enjoyed under the Emperor Charles V. He chafed against their restrictions and oppositions, took a part which vexed the leading men of Holland and Zeeland, and intrigued with

even as a shepherd to guard his sheep. When therefore he oppresses his subjects, he is to be considered not a prince, but a tyrant. As such, the estates of the land may lawfully and reasonably oppose him, and elect another in his room."

disaffected members of the clergy. The working of the Dutch political system was at this time and afterwards something like this. Every province had its own stadtholder, as it had had before the revolt from Spain, or, it might happen, two or more provinces united in selecting the same person to hold this office. The estates of the provinces consisted chiefly either of nobles or of towns, governed by town councils which *perpetuated* themselves without any popular vote. All the constitutions, then, were aristocratic, while there was a population of free men who had no share in the governments. In general meetings of the estates the deputies were sent by appointment of the particular province, and as the magistrates in the towns (the Schöffen or Schepen) were not skilled in political affairs, it had long been the custom for particular estates and for the estates of a whole province to transact their business by paid agents called pensionaries,\* who were sometimes accomplished lawyers and statesmen. Such was Olden-Barneveldt, a contemporary of prince Maurice; and such Hugo Grotius: both were in their time pensionaries of Rotterdam, and the former, of all Holland and Zeeland, that is of the council of the estates, hence called grand pensionary, having an influence from his station and character greater than that of any other man in the provinces. Holland with its large cities and its numerous operatives on the land and on the sea had, as has been said, a democratic class which was a dangerous element, and the more so, because the government was in the hands of the aristocracy. We may conceive that where the reformation under a synodal form of church government was organized, jealousies might arise between the ministers and the leaders of the state which were increased after Arminianism was beginning to supplant the Calvinistic theology at the university of Franeker and elsewhere. The sympathies too of such men as Barneveldt and Grotius lay on the Arminian side in theology; but espe-

\* See for an account of the office of pensionaries, Warnkönig, Staats- u. Rechtsgesch. Flandern, ii., 146, and § 237 of the present work.

cially these religionists were more willing to consent to state encroachments on church liberty than were their Calvinistic opponents. On the other hand the stadtholders of the house of Orange-Nassau had perpetual blocks put in their way by the leaders in the separate states—that is, especially in Holland, the great and rich province—and thus, as was very natural, there arose two parties, the state's rights party headed by such officers of the state as Barneveldt and the De Witts, and the Orange or more democratic party. The stadtholders of this house rested for their political support more on the smaller and north-eastern provinces; they also allied themselves with the Calvinistic or Gomarist party in the Dutch Reformed Church, and the lower classes in the towns were generally on their side. The united provinces were naturally jealous of a power that might grow into a tyranny, and thus they put a check on the general stadtholders that at times was very hard to bear. These complications of forces in the aristocratic bodies will explain and in part excuse the follies that appear in the history of the Dutch provinces. It ought to be added that nothing in the Utrecht union required a general stadtholder, or indeed any central government; so that when one died who had been in the office, the room was open for all machinations against appointing another. The choice of Anjou and that of Leicester were only temporary expedients, and pledged the states-general to no course for the future.

While Leicester was in the provinces, prince Maurice was stadtholder of Holland and Zeeland, and afterwards filled the same office, by appointment in Utrecht, in Overijssel (1590) and elsewhere. He was head-admiral of the provinces with an admiralty-council to assist and check him. He was the great general of the country, and his successes brought towns or forts still occupied by Spanish troops under the control of the republic. The capture of Groningen in 1594 united that town for the first time with the rest of the province under the Utrecht union. In 1598 Philip II. of Spain, by separating the Netherlands

Maurice, stadtholder of Holland, Zeeland, etc.

from his empire, and placing as sovereigns over it his daughter Clara Eugenia and her husband, an Austrian archduke, showed an intention to retire from the contest. His death in the same year rendered future hostilities either of Spain or of the Spanish Netherlands with the united provinces less probable than before ; and a truce for twelve years, in 1609, prepared the way for the peace between Spain and the Dutch republic, made at Münster in 1648, at the time when the peace of Westphalia was under negotiation. By this peace Spain acknowledged Dutch independence, and consented to the closing of the Scheldt, which brought with it the decline of Antwerp and the greater prosperity of the rival seaports of Holland.

The earlier years of the seventeenth century were filled with bitter religious disputes, and a synod was ordered with reference to them by the states-general, through the influence of Prince Maurice, and the votes of Zeeland, Guelders, Friesland and Groningen. The synod met at Dort in 1618, and the unrighteous condemnation of Olden-Barneveldt took place in 1619. This great crime was committed by the states-general then under the control of the Orange party ; and Maurice himself, not without unconstitutional proceedings, procured the downfall of his determined enemy by encouraging a feeling of religious intolerance in which he did not share. The synod condemned the remonstrants or Arminians, and many fled from the land.

We pass over a number of years, during which Maurice and his brother were stadtholders, down to William II. 1647, when William II., son of the latter stadtholder, was chosen to fill the office. There was then a dispute, between the states-general together with the stadtholder on the one part and Holland on the other, in regard to the dismissal of troops which the former wished to retain and the latter would have the principal burden of paying. The estates of Holland decided in 1650 to dismiss quite a number of companies without waiting for the states-general to act. The latter reminded the troops of their oath, bade them stay



and gave to the stadtholder power and orders, in conjunction with a committee of their body, to take the necessary steps to prevent this ;—such was the meaning of their language. The efforts to induce the towns of Holland to revoke the votes of the estates were fruitless ; and the stadtholder made a wild attempt, after arresting six members of the estates of Holland, to seize on Amsterdam, through his relative, Frederic of Nassau, stadtholder of Friesland. The attempt failed, and soon the prince died eight days before the birth of a son, who was afterwards William III., of England as well as of

Stadtholdership  
vacant.

Holland. From this time until 1672, the provinces were without a general governor. The disposal of places and the pardoning power were now given to the estates of the separate provinces. At the meeting of the states-general in 1651 the provinces of Friesland and Groningen claimed that the settling of disputes between the provinces required the decision of a stadtholder, but in the reply of the others several ways were mentioned of composing the difficulties.

For about twenty years the affairs of state in the provinces were managed by the very able John De Witt, grand pensionary of Holland. In 1667, the estates of Holland under his influence passed what was called the perpetual edict. Its articles were intended to abridge the power of appointment of a (future) stadtholder, and to prevent such an office from being united with that of general-captain. In fact, it aimed at doing away altogether with the stadtholdership. In the other provinces, in which an Orange party was stronger, an act called *the act of harmony* was substituted for this, by which the stadtholdership was allowed, but was forever to be separated from the offices of general, and of admiral in chief. In 1672, the quarrels between the Orange and the De Witt parties came to be very high, especially in the province of Overijssel. War also had been declared by France against Holland ; and England with Sweden were her allies in a most flagitious attempt against the republic. Its territories were invaded by

The perpetual  
edict.

Louis XIV. ; and the Bishop of Münster with the Archbishop of Cologne, on the borders of the provinces, joined in the alliance. Meanwhile, there was a desire expressed by the Orange party, then in the majority everywhere except in Holland, that the prince of Orange, not yet twenty-two years old, should be appointed captain-general for life. John De Witt had to yield, so far as to consent that he should hold that position for the existing campaign under some limitations, but even to this Holland would not give its assent. In November, 1672, when Prince William reached the age of twenty-two, he was appointed both captain- and admiral-general. The troops were in a poor condition ; no effectual preparations seem to have been made to resist the invaders ; Overijssel, Guelders, Utrecht, Drenthe, were occupied by their armies, and many of the people charged De Witt with being more anxious to put down the Orange party than to resist French arms. The Orange party was intensely excited by the unyielding energy of De Witt, and in June of this year he was attacked and severely wounded by four men of good condition, of whom one was beheaded, the rest having escaped. Demands were now made in several towns of Holland that the perpetual edict should be annulled, and the prince created stadtholder. Rotterdam, in the estates of Holland, brought forward the motion to do this, and Amsterdam proposed his elevation to the stadtholdership. Both were carried, and he received for life the dignity which his father had filled, with those of commander-in-chief of the armies of Holland and Zeeland as well as of their fleet, and of commander-in-chief in the entire united provinces. This outburst of feeling reacted against De Witt, and a mob dragging him with his brother from prison, where they were shut up, murdered them with fiendlike cruelty.

By 1674 the provinces which had been overrun were recovered, and the states-general gave the prince of Orange full power to reconstruct the government there as he would. Utrecht formed a new constitution with a stadtholdership of far more extensive powers than

William III. stadtholder.

the same office had in Holland. Holland itself made the proposition that his office should be hereditary, and the other provinces concurred. On his death, as King of England

Vacancy in this office. (1689-1702), and stadtholder of the provinces,

the failure of male descendants of his body brought up anew the question of a stadtholder, and the states of Holland, on suggestion of the pensionary Heinsius, gave the states-general to understand that they wanted no stadtholder for the future. A time of confusion followed in several of the provinces, the main cause of which was the attempt of the more democratic party in the towns to alter and get possession of the town governments. Only Friesland had a stadtholder in the person of John William Friso, a member of the Orange family, who, however, died at the age of twenty-four in 1711, a little before the birth of his only child, William Charles Henry Friso. The affairs of state were in the hands principally of Heinsius the pensionary, who on his death, in 1720, was succeeded by Van Hoornbeck, who was raised by the estates of Holland from the office of pensionary of Rotterdam to that of grand pensionary of the council of the province. The young Prince William Friso, by birth stadtholder in Friesland, was chosen to the same

Stadtholdership restored. dignity at the age of seven, in Groningen, and and at eleven with limitations in Guelders. In 1746, during the danger of a French invasion, the common people of Zeeland cried out again for the restoration of this office, and forced the government to yield. In the same year the nobility or noblesse of Holland proposed to confer on him the office, as a hereditary one both in the male and female line. The estates of Holland accepted the proposal. Only such of his descendants were excluded as should hold a royal or electoral dignity, or should not be conformed to the reformed religion (the Dutch Reformed Church), or should be married to a man of any other confession. All the provinces in turn accepted him in this capacity with nearly similar extent of power, and conferred on him other high offices besides, including that of governor in chief of the Dutch pos-

sessions in the Indies. Thus the Orange party may be said to have secured for their head a kind of limited monarchy, which on his death, went to his successor, his son by Anne, daughter of George II. of England. He was driven out of the provinces in 1795, at the time of the formation of the Batavian republic.\*

We notice in reviewing the progress of the Dutch constitution one or two points of some importance; and first the constant hold of the smaller, and especially the eastern, provinces on the desire to have a unitary head. The same is true also of the lower class in the sea-states, especially in Holland. Their leading motives in this feeling were, as far as we can judge, the fear they had of the aristocracy in the towns and lordships—the town-councils and seignors—and so they leaned on the house of Orange as their protectors. The anti-Orange party was not kept up by patriotic fears lest the successors of William the Silent might take away their liberties, so much as by the desire to control the country, and appoint the offices, as before the time when Phillip II. attempted to destroy their franchises. Another characteristic of Dutch politics was the hegemony of Holland. The states could do nothing without Holland; while that leading state, paying more than half the taxes, with immense wealth and, including Zeeland with all the commerce of the provinces, took an independent position, to which its culture and the far-sightedness of its statesmen entitled it. The union was full of faults, among which the rule of unanimity of all the estates in war, peace, and alliance, was the principal. Its continuance was due to war, as was its origin. Had a time of perpetual peace followed the truce of 1609 with the Spaniards, it seems questionable whether the provinces could have held together. It is worthy of notice that the question of a stadtholder came back whenever dangers began to be imminent from foreign enemies, and that

\* In the latter part of this sketch I have chiefly depended on Leo's history.



the eastern provinces do not seem to have had much sympathy with Holland. The form of polity cannot be called a *bundesstaat* in the strict sense; at the most it was one of the loosest of the confederacies that deserve to bear that name. The practical introduction of monarchy in a mild shape, late in its history, seems not to be due to a tendency towards unity of power in the polity, but to weariness of useless contests, and the decay of political life in an old and wealthy country.

Why was it, we may ask, that the federal republics of Switzerland and of the seven provinces had so different a destiny—the one developing itself in the course of time into a well-compacted democratic state, the other ending in a monarchy. The answer given by M. Passy in his treatise entitled, “*des formes de gouvernement*,” p. 346,\* is that the dissimilar destiny is owing to the difference of territorial situation. Switzerland, defended by its mountains and aloof from the politics of other lands, having once gained, could retain the form of polity suited to its traditions and forms of social life. Holland, with a commerce spread over the world, exposed to the jealousies of rivals in trade, with larger powers in its neighborhood, was almost of necessity involved in European war, “and at the end ranged itself amid the perils of invasion and ruin under a form of government which gave it a unity of direction; the absence of which would, without fail, have been punished by reverses more or less deplorable.” And this tendency towards a unitary monarchy was aided, he thinks, by the presence of the Orange family, which was associated in unfading remembrance with the heroic struggles of its birth and early years as an independent state.

All this may be admitted, and yet we cannot concede that the whole or the chief difference between the two was caused by territorial situation. Holland had a stronger aristocracy of wealth and ancient title than Switzerland, it grew more rapidly in wealth and culture, while the political interests as

\* Paris, 1870.

Federal system in Switzerland and the seven provinces compared.

well as the religious fell into the background. The liberties of the country assumed, in the feelings of the upper classes, relatively less importance. Then the French revolution was able to spread more there than in Switzerland, owing both to the proximity of France and to the greater dissatisfaction of the masses with the government; and when its period had passed, republican government was condemned by history. The liberties of both republics were provincial liberties, and the experience of the Dutch provinces—owing, indeed, to their situation—had shown the need of a union which their constitution could not afford. The Orange family in one of its branches was still on hand to make a line of kings out of. And the powerful voice of all Europe would have been lifted up louder than it was at the restoration, if the country had offered a stout resistance to the change of polity, because republics seemed to have in them a revolutionary element.

## § 212.

### *United States of America.*

No people in modern times has been led to choose its form of government by a clearer voice of providence, as expressed in its whole history, than the people of the United States. The principal considerations which justify this assertion and justify the right of our union to exist, are chiefly these:

1. There were affinities enough in the colonies to unite them together, and differences enough to keep them in the condition of separate states. All, with one exception, were of English origin; they brought with them English law and municipal institutions; they had a common reverence for the mother country, and long had no thought of any more independence than their charters gave them. The only exception, New York, became English by the peace of Breda (1667), so early that it was easy to impress an English stamp upon it. On the other hand, the differences were quite as noteworthy. In the most northern colo-

Union of English colonies natural.

nies the Puritan settlements were begun mainly, in order to enjoy religious forms and convictions in peace. They showed the English self-governing spirit in its highest degree. Their colonies were homogeneous from the first. If any colonies had consolidated themselves into one, it would not have been hard for them to make the experiment with success. In fact, New Hampshire and Massachusetts were connected for some time together, and New Haven was united permanently with Connecticut. Thus also the territories and the province of Pennsylvania were made distinct governments in 1703, and the Carolinas were divided in 1729. But, on the other hand, it was easier for colonies of moderate size to thrive than for vast ones, and such a size, by rendering long journeys through unsettled tracts for justice and legislation unnecessary, made self-government far easier. The southern cluster of colonies had a character of their own, intensified, as we shall see, by their form of industrial life. The middle were so unlike in early origin and settlement, that each one had a character of its own. Penn's colony differed greatly, at the beginning and onward, from New York.

Another great difference lay in the form of life to which the diversities of soil, climate and the outline of the coast called them. The northern colonies were shut out from the cultivation of those plants like cotton, rice, or the sugar-cane, which could be produced in many parts of the southern country. This limitation and their good harbors called them in part to commerce and fisheries. They were destined to be a commercial, and were fitted to become a manufacturing people. Their main distinction from the southern country, however, lay in this—that slavery, though it penetrated into all the colonies and was allowed in all, could never thrive in the north. No great planters with troops of slaves could exist in this part of the colonial territory; while at the south it was almost necessary that families of slaves should be numerous and population scattered. The results of this were great. The north could hold on to the township system, suggested by the state of things in old England before the

yeomanry had disappeared. They could meet together in town meetings, and have village centres scattered about; cities could grow up with the growth of business; while at the other end of the English settlements the county-system prevailed, requiring a considerably larger district than a township, and devised for judicial purposes rather than for those of religious and social communion. Town life, therefore, and social life formed the manners far more at the north than at the south.

While slavery thus affected the forms of society, it affected society also in its habits and divisions. At the north labor was always respectable; and the laborer could become with ease a landholder, so as to take a part in town and other government. In the lands of slavery, the mass of farm-laborers being negroes and slaves, labor was not respectable unless among the settlements in the upper country above the falls in the rivers. Yet there were very considerable numbers of white persons owning small tracts of land, who had to labor for themselves. The inevitable result was to depress and degrade these poor whites; and the result of the whole mode of life, which scattered a few whites over a large area, and rendered it impolitic if not unsafe to have slaves taught, was to make a school system difficult; while in the northern colonies schools were spread over all the hills, and learning, as well as religion, was a prime interest of society and of the political communities.

2. The colonies were learning, by the events of their history and the experience of their institutions, the discipline of self-government. It is not necessary here to repeat what de Tocqueville and others had said of the importance of our institutions in developing a political instinct and a self-governing practical power. One or two points, however, need to be adverted to. One is that dangers and wars in which England was engaged naturally called forth some efforts for concerted action. Such was the union of the four New England colonies in 1643, which had been suggested several years before, and was now actually set on

Early attempts at confederation.



foot by resolutions of the general courts. The reasons assigned were, among others, fear of the savages and of the French, with the affinities between the colonies. Dr. Holmes (*Amer. Annals*, i., 270), says that "the union subsisted with some alterations until 1686, and was acknowledged by the authorities in England from its beginning until the restoration, and in letters from King Charles II., notice is taken of it without any exception to the establishment." When we read in Hutchinson's history of Massachusetts the articles of this union, we are startled and seem to see a project for a new commonwealth. It was a firm and perpetual league, offensive and defensive, between Massachusetts, Plymouth, Connecticut and New Haven—Aquidnick or Rhode Island being kept out by the ill-will of Massachusetts. "Each colony was to retain a distinct and separate jurisdiction, no two colonies to join in one jurisdiction without the consent of the whole, and no other colony to be received into the confederacy without the like consent. The charges of all wars, offensive and defensive, to be borne in proportion to the male inhabitants between sixteen and sixty years of age, in each colony. Upon notice of an invasion from three magistrates of any colony the rest were bound immediately to send aid, Massachusetts one hundred, and each of the other colonies forty-five men : and if a greater number should be necessary the commissioners were to meet and determine upon it. Two commissioners from each government, being church-members, were to meet annually the first Monday in September ; the first meeting to be held at Boston, then at Hartford, New Haven and Plymouth, and so yearly in that order, saving that two meetings successively might be held at Boston." Then follow articles to the effect that six commissioners shall constitute a majority, that the commissioners shall have power to establish laws of a civil nature and of general concern for the conduct of the inhabitants, relative to their behavior towards the Indians, to fugitives from one colony to another and the like ; declaring that no colony shall engage in war without the consent of the whole except upon

a sudden exigency ; and relating to extraordinary meetings and breaches of the articles of agreement (Hist. of Mass. i., 118-120, ed. 3). In 1645, the commissioners make preparations for war against the Narragansett Indians. In 1675, the same body decided to raise from the colonies (now three in number, New Haven having been merged in Connecticut), one thousand men against the same Indian tribe—a force with which they ended the war.

In 1754 another union still more worthy of notice was projected by delegates from six or seven colonies who had been called to meet at Albany in reference to negotiations with the Indian tribes called the Six Nations. It was proposed to establish by leave of parliament a general government, with a president-general appointed by the crown of Great Britain and a council of members chosen by the colonial assemblies,—these numbers to be in the ratio of the sums paid by each colony into a general treasury. The president-general was to have the whole executive authority. Legislative power was entrusted to the council and to this officer, who was to have a veto on the passage of all bills. The powers of this government were these: to declare war and peace, to make treaties and regulate trade, to settle new colonies and make laws for them until they should be erected into separate governments, to raise troops, build forts, fit out armed vessels and use other means for general defense ; and for these ends to lay duties, imposts or taxes. All laws were to receive the king's approval, and to remain valid, unless disapproved within three years. Appointments for the land and sea service were to be made by the president-general and approved by the council ; civil officers to be nominated by the council and approved by the president-general. This plan was agreed to by the delegates at the convention, except those of Connecticut, who opposed it on account of the veto of the president-general. The assembly of the same state rejected it for this clause and for the power of levying taxes which it contained. The other assemblies rejected it as giving too much power to the president-general, who represented

the king ; and the king's council rejected it, as giving too much power to representatives of the people. The plan agreed to in convention was drawn up by B. Franklin.\* It was suggested and commended by the fear of invasions from the French and Indians during the war then apprehended.

After the passage of the stamp act in 1765 a congress of twenty-eight delegates from nine states convened in New York and passed resolutions declaring their rights as British subjects, and their grievances ; of which the principal one was that act itself, which taxed them without their consent and extended the jurisdiction of courts of admiralty. The congress agreed on a petition to the king and a memorial to each house of parliament.

These unions and conventions, together with the joint treaties that several colonies concluded with the Indians, show the political sense pushing itself out into a broader field, after having been cultivated in town communities and in legislative assemblies. It was no new idea after the outbreak of the revolution to construct a confederation. The quarrels, also, of several legislatures, with their royal or proprietary governors, in colonies where the governors were not elected by the people, were also a preparation for an independent political condition ; so that when the parliament passed what was considered to be oppressive and unauthorized acts, the colonies were armed with precedents and analogies drawn from the English constitution, as well as animated by those views of the right of revolution and the powers of the people which were beginning to spread over one of the most important countries of Europe, and had been sanctioned in one instance, at least, by the express action of the mother country herself.

3. When the revolution began it was of the greatest advantage, first, that the war bound the colonies together, and then that the old confederation was found to be an insufficient bond.

The "old confederation" and its defects.

\* Comp. Holmes, u. s., ii., 55, 56, ed. 2, under 1754.

It is not enough for a people to form political unions by getting constitutions made to order, and by copying approved models ; there must be something for national feeling and a sense of unity to rest upon. The revolutionary war created a common history, of which no state needed to be ashamed, and prepared the way for union, not merely by the necessities of the times but by exertions and sufferings in a common cause ; and the feeling of unity thus enkindled could overcome, for the time at least, all causes of division. Hence in more ways than one the war made us a nation.

Of still more importance was it that the old confederation was formed, tried, and found wanting ; that it was found to be unsuited for the times of peace, which ought to occupy nearly the whole of a nation's existence.

The preparations for the confederation were briefly these : after the passage of the Boston port bill, which took effect June 1, 1774, the colonies regarded parliament as aiming not at one colony only, but at all ; and Virginia recommended a general congress, which should meet annually for the protection of the common interests. A resolution of the same import came from Massachusetts, and was at once seconded by every colony except Georgia, from which colony a delegate was sent by only a single parish in March, 1775 ; while the colony soon afterwards acceded to the measures of the more northern ones. The first general or continental congress from eleven states met in Sept. 4, 1774, with no powers except those of giving advice, making protests, and the like, or, in general, of directing public sentiment. Every colony represented was to have one vote, and their recommendations were adopted everywhere except in the colony of New York, where the royalist party was strong. A second congress from eleven states, appointed before the battle of Lexington, April 19, 1775, met at Philadelphia, petitioned the king, voted that twenty thousand men should be raised and equipped, appointed Washington commander-in-chief, emitted bills of credit, and apportioned them among the twelve united colonies ; and, ere the year had expired, resolved to fit out a



navy, and established a system of posts and a hospital. The next year it was voted almost unanimously that the united colonies are and of right ought to be free and independent states (voted in June and to be proclaimed July 4), and the states which had as yet no governments adequate to their present exigencies, were advised to establish them. Not long after the capture of Burgoyne's army in 1777, articles of confederation and perpetual union were agreed to in congress (Nov. 15), which, when approved by the several states in their legislatures, were to be ratified by the deputies in congress. Such ratifications were made by eight states on the 9th of July, 1778; three more followed within the same year, that from Delaware came in 1779, and that from Maryland not until March, 1781. The reasons for the delay of nearly eight months before the first ratifications, and the much longer delay of two states, lay in the claims of a number of states under their charters to jurisdiction over territory reaching to the South Sea (or Western Ocean); it was maintained that congress ought to fix the western boundaries of the states possessed of these vast domains, and that unoccupied lands ought to be the property of the whole union, which had, by its common exertions, secured them for settlers from the United States. The legislature of Maryland having in January, 1781, withdrawn their objection, the union was then complete.\* Several amendments were made to the articles, all of which were rejected. Those suggested by New Jersey to the effect that the United States ought to have the power of regulating trade, and of using the revenues from duties and customs for public purposes, pointed at a weak spot which it needed some time to make apparent throughout the country.

The confederacy established in this instrument is called the United States of America, and the states, each retaining its sovereignty, freedom, and independence, with every power not expressly delegated to the United States, enter into a perpetual league for common defence and general welfare.

\* See G. T. Curtis, *Hist. of the Constitution*, i., 130 and onw.

All privileges of ingress and egress, and all duties or impositions in each state, are common to the free citizens of all the states ; extradition between the states and full credit to judicial documents, shall be everywhere allowed. Delegates shall meet annually on the first of November, not less than two nor more than seven from each state, and every state, through these delegates, shall have but one vote. Of course the vote of a state might be made null by disagreement of the delegates of any single state, when there was an even number of them. Every state was to pay its own delegates. The states are forbidden, without the consent of the United States, to hold any diplomatic intercourse with foreign countries, to make treaties or alliances with one another, to lay imposts contrary to any treaty of congress, to keep up vessels of war in time of peace, and maintain forces except with the consent of the United States, and in such numbers as the United States might allow. Nor should any state make war unless actually invaded, or unless danger of invasion from the Indians should be imminent, nor grant any letters of marque except against nations with which the United States were at war, and under regulations by congress established, except during exposure to attacks from pirates. The expenses of war were to be defrayed out of a common treasure to which the states should contribute in proportion to the value of their improved land and buildings, the taxes to be laid and levied by the several states within the time agreed upon in congress. To congress was to belong the right of making war, peace, alliances and treaties, provided no treaty should restrain a state from imposing the same duties on foreigners which should be laid on their own people, or from prohibiting the importation or exportation of any article whatsoever ; also the right of granting letters of marque in time of peace, of making rules concerning capture by forces of the United States, and of setting up courts of appeal in all cases of capture, and for trial of piracies and felonies on the high seas. Disputes between two states concerning jurisdiction, boundary, or for other cause, were to be settled by a kind of court of arbitration es-

established for the occasion by congress ; and a similar method is provided for, of settling disputes concerning the private right of soil under different grants of two or more states. Congress, also, was to have power to fix the amount of alloy and the value of coin struck by their or the states' authority, to regulate trade and all affairs with Indians not members of the union, to establish post-offices and take postages, to appoint all officers in the land or sea service of the United States, and to make all regulations for the government of the army and navy. A committee of one from each state sitting in the recess of congress were to be clothed with very extensive powers for carrying on the affairs of the confederation, which powers are mentioned at length ; but they do not include any of the powers for which the vote of nine states is requisite. A vote of nine states is made necessary for engaging in war, granting letters of marque in time of peace, making alliances, coining money and fixing its value, ascertaining the necessary expenses, emitting bills and borrowing money, agreeing on the amount of land and of sea forces to be raised, appointing a commander-in-chief of the army and navy. The congress may adjourn for a time, not longer than six months within the year, and to any place within the United States. Alterations in the articles shall not be made without a unanimous consent of the states, and the union is to be perpetual. This constitution came into force March 2, 1781.

As the surrender at Yorktown in the autumn of 1781 put an end to active war, the confederation did not have a long opportunity of testing its strength, before the state of things came on for which it was least fitted. As we look on it now we find it full of defects. There was no head or real executive authority provided for ; there was no supreme court in any way adequate to defend or interpret the articles ; the project of arbitration was exceedingly clumsy ; the general expenses had to be provided for by the states, and there was no force to compel the states at any point to do their duty. Suppose a state sent ambassadors abroad, or retired from the union, or asserted its rights against another state by force,

who was there to hinder it? What security could be furnished by a government without troops and a clear power of raising an army that would be available for quelling a rebellion such as that of Shay in Massachusetts in 1786? What could hinder states having each the power of collecting a revenue by duties, from interfering with each other by border custom-houses? The states were forbidden to lay imposts contrary to treaties with foreign powers, but what power was there to prevent or punish transgressions of this rule or other infractions of the law of nations? These and other difficulties soon became apparent, and many persons were becoming dissatisfied with the confederation, as being an instrument inefficient and unable long to preserve the states in any kind of union.

These feelings were fully justified as the United States returned to a condition of peace, and even while the war lasted. The congress of the confederation in fact broke faith with the officers to whom the continental congress had voted half pay for life after the war, on the ground that the votes of nine states were necessary for such a measure, and that a less number had been in favor of it when it was past or were in favor of it now. There were grave dangers to be apprehended from such a step, and the middle course was taken of commuting the half-pay for five years' pay in full. The history of the obstacles in the way of paying interest on the public debt is a long and distressing one; suffice it to say that neither could the states be induced in sufficient numbers to give the congress a power to collect duties; nor, owing to the opposition of New York, could the plan of permitting congress to do this for twenty-five years be carried; nor were the states prompt to pay the requisitions made upon them in order to meet the claims of foreign and domestic creditors. In 1786, two states actually attempted to pay their proportions of what was required in their own paper money, when these were due in specie. State laws again interfered with the obligations assumed in the treaty of peace, one of which was (Art. iv.) that creditors should meet with



no lawful impediment to the recovery of debts at their full sterling value. In several of the states laws forbade the recovery of the principal or of interest, or allowed payments in land. All such laws—and others suited to the necessity of the times when enacted—now became unlawful, but they were not immediately abrogated. Hence, the British government, two years after the treaty, retained their western military posts upon the plea that the treaty was not observed by the other party. Most of the states repealed laws placing barriers in the way of the recovery of British debts. But Virginia made this conditional upon notice given by the governor that Great Britain had delivered up the western posts, and had restored the negroes taken away from persons in the state during the war, or made compensation for their value.\*

It is instructive, in regard to the weakness of the confederation, to notice the measures taken by Great Britain concerning the commerce of the United States. There was and could be no treaty of a commercial nature with congress, and the states could make none. Commerce, therefore, meanwhile, from the United States with British possessions could be regulated only by orders in council. Such an order, passed in 1783, excluded from the British West Indies all ships from the United States, and the importation of fish with other articles even in British vessels. This measure of vital importance was met by retaliating propositions, and enlargements of the powers of congress to make commercial treaties were recommended; but the states acted so slowly and so little on a uniform plan, that nothing was gained whatever by applications to them. In the spring of 1784, congress appointed a commission to negotiate commercial treaties, expressing in their resolution for this purpose "that the United States, in all such treaties and in every case arising under them, should be considered as one nation upon the prin-

\*The treaty in Art. vii. provides that with the army, when withdrawn, negroes should not be carried away.

ciples of the federal constitution." Yet, as Mr. G. T. Curtis remarks, "the federal constitution did not, at that very moment, make the United States one nation for this purpose." \*

The years during which the confederation dragged out its life, especially the last ones, were years of commercial distress, of distrust and apprehension, of debate as to what should be done to put the United States on a better foundation. Thus looked at they brought with them a precious experience, leading all thinking men to the conviction that some government with larger powers was needed, which, by offering hope of relief to distressed classes, could secure their aid. That a convention should be called for a revision of the constitution, rather than that the congress of the confederation should take this matter in hand, was a very important step. Had the other way of getting at a better form of government been pursued, the amendments, probably, would have been partial remedies of defects acknowledged by all, and another abortive constitution would have been given to the United States. The convention, however, itself was rather felt to be necessary than likely to be a great step forward. Thus, the debates themselves were of the highest value in fixing the opinions of the delegates in favor of a government with powers so new and vast that they would have frightened the colonies had such a polity been seriously urged at the time when the old constitution was established. The convention met May 14, 1787, agreed on a constitution Sept. 17, and resolved (October 4), that it should be sent to the legislatures of the states in order to be submitted to conventions chosen by the people. Eleven states were present—all but North Carolina and Rhode Island—and twelve had been represented in the convention—all but Rhode Island. When it came before the state conventions it met with objections in some of them. New York and Virginia gave their assent with the understanding that

\* Hist. of the Constit., u. s., ii., 287. We acknowledge our obligations to this author for material aid in regard to the defects of the confederation.

certain additions should be made to the instrument of government, providing for the more perfect security of the states and of individuals against encroachments from the general government. North Carolina came into the union late in 1789, and Rhode Island in 1790. Meanwhile, in March, 1789, the government had been organized, and the chief magistrate entered upon his office. Between this date and the date of the accession of Rhode Island, a question of good faith and of constitutional law occurred, owing to the giving up of the old confederation. The twelfth article of that document declares that "the union shall be perpetual; nor shall any alteration at any time hereafter be made in any of the articles, unless such alteration be agreed to in a congress of the United States, and be afterwards confirmed by the legislature of every state." But these alterations, if they could be called such, were not agreed to in congress, nor were they confirmed by the legislature of every state until the smallest of the states added its confirmation to the rest in 1790. Strictly, then, there was a violation of the compact until that time. But the pressure for a change was so great, the danger from delay so serious, that it seemed necessary to go forward; the measure itself of constructing a new polity by a convention had something of a revolutionary character; and we may say that the terms of the article in question did not contemplate a new frame of government, but a mending of an old one. Thus, ordinary rules were not applicable to the proceeding, and doubtless the other states, if unanimous, would have been justified at such a serious crisis in crushing the little obstacle to perfect union by war, if that had been the necessary means for the end before them.

### § 213.

Supposing the provisions of the existing constitution to be

Nature and spirit of the U. S. constitution. It is a state. familiar to my readers, I proceed to make some remarks upon its nature and spirit.

I. It creates a state formed by a league, and not a simple confederacy of states. This very important characteristic is

shown to belong to it in various ways. Thus, while the articles of the earlier constitution are called "articles of confederation and perpetual union between the states of New Hampshire," etc., the new constitution begins with "We, the people of the United States—do ordain and establish," etc. This change was without doubt intentional. Again, the confederation was created by legislatures. It closes with the words "and whereas it hath pleased the great Governor of the world to incline the hearts of the legislatures we respectively represent in congress to approve of and to authorize the said articles," etc. On the other hand, the instrument of 1787 was to be put to vote to the people assembled in conventions in each state, and not to be confirmed by the legislatures.

If we look at certain important provisions of the instrument we shall reach the same conclusion. Article VI. declares the constitution and the laws made in pursuance of it, and all treaties made under the authority of the United States, to be the supreme law of the land; and that the judges in every state are to be bound thereby, anything in the constitution or laws of any of the states to the contrary notwithstanding. It proceeds also to prescribe an oath, pledging to the support of the constitution all members of the state legislatures, the executive of the states, and their judicial officers. And this support must be given not to the constitution, as they shall interpret it, but as the supreme court of the United States shall find its meaning to be, in case any of its articles shall have been the subject of their judicial interpretation.

Still more evident is it from the nature of the powers conferred on the United States that it is something more than a league or mere confederation. The general government, or congress with the chief executive, has all relations, commercial and political, with other nations in its hands; it has the exclusive control of commerce between the states, the exclusive right of laying imposts and duties on imports and exports, and on tonnage; the exclusive right of keeping troops



and ships of war in time of peace ; the sole right of declaring war and of engaging in it, except in actual invasion or imminent danger of invasions of state territory ; the right of laying and collecting excises and other internal taxes ; the power to suppress insurrections by its own armies or by calling out the militia of the states. It has, thus, if there should be serious resistance to the laws or any movement of violence in which a state is concerned, the power to treat such a state as in a condition of war, to close its harbors by a blockading force, to stop communications with it by the port officer or in any other way, to pour troops into its territory. All these are evidently state powers, so that the United States are the only true state, and its sovereignty the only true and eminent sovereignty. It is a great pity that the confederation and the revolution fastened on us the name United States, although it expresses a reality ; for it has ever been played false with, as if there was not something greater and higher than the separate states created by the constitution. And the word sovereignty, which is used in the articles of confederation and in the treaty of peace of 1783, as a quality pertaining to the states, is no longer applicable to them within the union, and is carefully avoided in the present constitution. It has " paltered with us in a double sense " as if there could be two sovereigns, one without any international powers, and many other properties essential to a true state, the other with these in full tale.

2. It is a state formed by a union without merging the ex-  
The states still kept up their organization. istence of the members in that which they created. The highest expression of this is that all the states, great and small, have an equal representation in the senate, chosen by the states in their legislatures and not by direct voice of the people. This was made essential to the formation of the constitution by the small states ; and is confirmed by the constitution in the clause of Art. V. that " no state without its consent shall be deprived of its equal suffrage in the senate." This then is beyond the reach of any amendment in which the state concerned does not con-

cur. For aught that appears, new states might have been received on some other condition, either that of having no representation at all or but one member in the senate ; but that would have tended to destroy the senate itself, which is the keystone of our arch, and without which consolidation or division would be more to be feared than they are at present.

The same intention to continue partial state independence is shown—to go no farther—by the ninth amendment—“ the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people,” where “ *delegated* ” is an unfortunate word. This clause is most valuable as confining the departments of government strictly within their spheres. The expression *prohibited to the states* points at what is a peculiarity of the constitution—that it deals with the states not in the way of command to do, but of prohibition against doing. Only in the way of prohibition is serious interference in state affairs possible. A command—as for instance one that has been suggested by high authority—that the states should all pass school-laws of a certain kind, would be a most serious departure from the spirit of our constitution.

3. Perhaps the most unique provision of the constitution is that which relates to the supreme court of the United States. Here the weakness of the confederation was manifest, and experience suggested a remedy which was perilous, perhaps, but not as dangerous as the institution of an administration clothed with great and extensive powers. The court has power extending “ to all cases in law and equity under the constitution, the laws of the United States, and treaties made under their authority.” Where, therefore, a law is resisted by a private person, whether acting as an agent of a state or for himself, the only valid plea he can make is that it is opposed to the constitution. What the constitution means becomes thus a question which in the last resort the supreme court must decide. So also the interpretations made by officers of the administration in their departments, by the attorney-general, or even by the presi-

dent, may be resisted and examined ; and the laws passed by congress are subject to the same ordeal. The mighty efficacy of the single clause that “ no state shall pass any law impairing the obligation of contracts ”—which brings before the court the question what are contracts, and whether a law impairs their obligation—has been already adverted to. This is one of the great checks on arbitrary state law against individuals. Again, the court has, in controversies between two or more states, such as those relating to ownership of lands boundaries and the like, a jurisdiction which may be called arbitral, answering to that of *austrägalinstanze* in Germany, which have been there rather desired than established. Thus the court is the moderating power of the constitution, and while it has no might and may be opposed by might, it has been able to carry its decisions into practice. They have been respected and received, with scarcely an exception, by an influential profession, which admits the force of precedent but demands reasons, as well as by the intelligence of the country. We cannot help believing that the supreme court has saved the country from infinite evils, and that to break it down would be to dissolve the union.

Two presidents, Jefferson and Jackson, held that each department of the government possessed the right of independent interpretation within its own sphere. Thus there would be three interpreting powers instead of one, and every opposite party through its chief, when successful in raising him to power, could nullify in practice the enactments of prior holders of power. Thus also congress, if they overcame a veto, would make the law for supreme court and president, nay, the latter might in some cases disregard the veto. Such a view finds no support in the constitution, any more than in sound reason. The president is bound by oath to support the constitution as it has been interpreted by the court ; acting only on new cases independently until they shall be submitted to the supreme tribunal ; just as judges in the states and members of state legislatures, when they take the same oath, take it with reference to the constitution interpreted by that same

interpreting power. Otherwise there are as many expounders and explainers as there are judges.\*

Nor is there any serious danger from this high prerogative. The interpretation can be overruled ; the constitution can be altered ; the supreme court comes to consist of new members ; the legal profession through the country acts on and rejudges its decisions. Mr. Calhoun, in his " Discourse on Government," contends that the court is created by the dominant party, and expresses their judgments. But as the court changes not with a change of party, as it is removed almost wholly from the influences of party and of existing public officers, as to a great extent it is not and cannot be selected from active partisans but from busy, respected lawyers, as it must have a certain fear of criticism from the profession which furnished its members ; the opinion seems to be untrue and unjust. The supreme judges may have biases. But did not Mr. Calhoun have biases and very strong ones ?

If there were in our constitution no such ultimate power of interpreting the laws and of deciding whether new laws were consistent with the fundamental law, there is reason to believe that the union could not have been kept together. If the political chief of the time had been invested with an equal power of interpretation, or a state had not been bound by the decisions of the supreme court of the union,—as it would be by its own courts in regard to its own constitution and laws,—it is plain that there might have been no general law in force through the country or general agreement in regard to the interpretation of our most important document. The supreme court is the anchor of the United States, and there can be but one such anchor.

4. The executive power of the United States is ample for all the needs that can arise under the constitution, and is so contrived as to give unity to the administration. By the experience of a weak government without a head, collapsing as soon as common danger was

Executive of the  
United States.

\* Comp. Pomeroy's *Constit. Law*, § 136.



over, the founders of the government were led to a government under a president with very extensive civil, military, and international powers, who commands the army, has a negative on laws of congress when less than two-thirds have passed them; has vast appointing powers exercised with the consent of the senate or without asking their advice; and has all power of advising the national legislature and of watching over the subordinate officers, as well as of removing them for cause. No presiding officer in a democratic confederation ever had in time of peace such extensive powers before ; he holds them for four years, with the possibility of re-election ; and since the constitution was framed they have greatly increased in importance : indeed, the appointing power has grown to many times what it was when the republic was young. It is the peculiarity of this power that it is *personal*, not official, like that of an English sovereign, exercised almost entirely through the prime minister. Thus, if the majority should change in the country and in congress, he has an independent position : he has power enough to oppose the sentiment in congress and in the country, to stand in the highest place as the forlorn hope of his party, and take measures to continue them in the possession of the government. He is thus essentially and of necessity a man of a party. I shall discuss this position, given to an American president, when I consider party and party government in free states. At present it may be well to answer the question whether, under an officer with such high prerogatives, consolidation is not possible ; whether, as the extensive authority of the consuls at Rome helped on the transition to the empire, there may not lie in the germ, in this high officer of the United States, a future democratic emperor, the most hateful of all forms of official rule. To deny the *possibility* of this would be folly. Any political ruin is possible in the decay of morality, the loss of religion and the rise of new interests unknown to a state at its beginning. But here the states' powers, which must be overthrown in order that such a princedom may arise, are our safety ; and at present there is no sign of their giving way, nor of

thoughtful men becoming tired of them. Another question in the opposite direction is whether the constitution provides sufficiently against its own disintegration. This used to be the string on which those pulled who did not trust to anything in the shape of a confederation; and they were fortified in their opinion by the history of the breaking up of other similar governments. The strength of the central administration had never been fully tested, nor the feeling in the states towards the union. This feeling was miscalculated and underrated not only by political philosophers in Europe, but also by the advocates of nullification in this country. That there should have been a strong party in one part of the union holding opinions hostile to the true sense of the constitution, that this party should really have had the government in its hands the greater part of half a century, that it should have conceived that there would be no great struggle in cutting the country in two, shows that the opinion as to where the greatest danger lay was not wholly illusive. But it must be remembered that slavery in a number of contiguous states gave facilities for combination which the variety of interests in the northern states rendered impracticable in that quarter; that the southern power, although essentially aristocratic, played with and governed the most democratic of the northern parties; and that they were misled by the belief that the north would not try force to preserve the union and to compel them to stay in it. Thus they were profoundly ignorant of those deepest feelings of men in political states, which lie quiet in the breast until danger actually comes. They felt, indeed, the strength of the moral antipathy to slavery, and dreaded it as a factor in future parties; but they did not estimate duly the strength of the union feeling, which had no chance to make itself known. It was not the constitution then, simply, which called the north into armed contest, when secession went into act; but all the feelings, strong beyond any one's estimate, that clustered around the union in fond loyalty. The result showed the weakness of the secession or disintegration principle; it showed that the government was pro-

vided with all necessary powers for carrying the country through a most fearful contest. But it taught also, that principles of allegiance to government are not measured by interests or by hope and fear simply; that such dangers as were then brought on us are met by what ordinary politicians do not feel and do not understand. A constitution is something good in itself, but the possibility that under it the best feelings may be ready to appear when they are needed, is something better. Here we go beyond the line of political thought into a region which some politicians hardly visit.

As for new possibilities of disintegration, we cannot deny them, nor can we tell what new tendencies may appear in the system, when the states already large in number shall become still more numerous. But the late attempts at separation have shown an unexpected strength in the regard for the constitution and the determination to uphold it. The great cause of division, slavery, being removed, the combinations against the present order of things among contiguous states can never arrange themselves with so much advantage again. And there is a cause for keeping the states together which nowhere else, it would seem, has had so much efficacy. The east cannot flourish without the west, nor that without the east. The mouth of the Mississippi can never be left in the hands of a power which could oppose the inland states for which that great river is the outlet. The states on the Pacific have no motive to live by themselves, nor could they seek a divorce from the eastern seaboard and from Europe. Family ties, especially on eastern and western lines, bind the country together. It seems as if the country had been made on purpose to be one.

Danger of disintegration.

§ 214.

The rise and destiny of the leading confederations that have appeared in the world's history show that they have begun in the interests of mutual protection, and are not held together without difficulty. They are not a stage through which a nation passes by natural de-

General remarks on confederations.

velopment, nor does anything show that a unitary state can break up into a confederation. A confederation is a union of bodies politic that have certain resemblances and certain differences, tendencies to come together and tendencies to remain apart. If they have a community of language, law and general civilization, similar political views and a similar experience, together with interests that can be reconciled; they can form a close union, which alone after a lapse of time ensures the perpetuity of their political forms. If one or more of these are wanting or should in time come to be wanting, a loose union is all they can hope to form; or if they succeed in forming a close union, it will scarcely be able to continue. History shows especially the dangers attending any union where one member is vastly greater or more favorably situated for action than the others; it cannot fail to swallow them up. Something depends also on the national character, if the *conservative* forces of a union are to prevail over *destructive* forces. Thus individualism, a want of deference and of the spirit of concession, lawless self-assertion, must be an isolating, disruptive force in confederations as well as in states. In the former, the bond of union is the weakest point and gives way first before opposing powers; in the latter, violence in society is the great evil, but cannot destroy a state, unless civil confusion opens the road to a conqueror from without.

The danger of consolidation is a very possible one, but it supposes either violent conquest from within, or the obliteration of differences that existed before the union. If the former be supposed to take place, it must be due to great evils, to degeneracy and corruption, and the conquest will be a violent irregular relief from unendurable evils; if the latter, it will be a gradual, natural process, a substitution for more complicated machinery.

We only add that confederation is limited to states under certain constitutions. Two or more absolute states cannot enter into a union which is a perpetual limitation of human will; and the freer states are, other things being equal, the more easily do they coalesce.



## CHAPTER IX.

### DEPARTMENTS OF GOVERNMENT IN A STATE.

#### § 215.

THE political community, independent and sovereign, cannot act directly except when it meets in general assembly in a state of small area. Even then it would need agents to do the greater part of the political work. The whole community cannot be generals in war, or collectors of revenue, or presidents of courts. If there is to be a senate together with an assembly of the citizens, a small part only can belong to such a body. Are there now any departments or kinds of agency, into which the various activities of the state ought to fall? The common division of powers has been into the executive, legislative, and judicial departments. In every polity, says Aristotle, there are three parts (or departments), the suitable form of each of which for a given polity the wise lawgiver ought well to consider. When these three departments are well organized, the state as a whole will be well organized, and states differ from one another by reason of the difference of these three departments. The first of the three is that which deliberates on public affairs. The second is the body of magistrates, where the points deserving consideration are what they ought to be, over what they should have power, and how they ought to be chosen. The third is the judging department. (Pol., vi. or iv., 11, § 1.) He then proceeds to speak of these departments at some length. (Chaps. 11-13.)

When a state spreads over a large territory, it is impossible for the inhabitants, supposing them to have passed out of the condition of small self-governing communities into that of a consolidated body, to meet together any longer. Hence

it would happen (unless some political device were found out to prevent the evil) that the outlying districts would lose their political status, and become unfree. The state also, probably, would suffer in its constitution from its size. The old general assembly, being unable to attend in person to its large duties, would need to put power in the hands of agents; and these executive officers might, ere long, become holders of power in their own right. Thus, Rome with its old organization could not keep the empire together; either a breaking up or a more continuous and autocratic administration would be a necessity. As a remedy for such evils the representative system has grown up in the world, suggested perhaps, by delegates to church councils, and by deputies from independent bodies acting together. By this great political contrivance it is possible for a large state to be a free state, for a popular constitution not to fall into the hands of the executive,—not to speak of other most important advantages which will presently appear. But when the representative system is developed, the people is no longer an active holder of power, as in the ecclesia or the comitia; in the making of laws, as in administration and justice, it has intrusted direct power to its vicars. Hence the greater necessity of defining and limiting their power, of declaring in constitutions what the functions of the several powers are, in order that the agents may not dethrone or enslave the now inactive political community.

The inquiry has been made, which of these three, the executive, the legislative, or the judicial department, is the sovereign or the principal agent of the sovereignty? In theory we may say that the department which lays down general rules binding on the rest, which in the few words of a law commands or forbids without exception of person or limit of time, stands above the rest and is the truest vicar of the sovereign community. And this will be more evidently the position of the legislative department, if it provide for the wants of the state, not by general legislation as by a tax-bill continuing until repealed, but by laws

Which department  
is supreme?

or bills which are valid for short periods only—so that the department which has to spend money or control the army is kept in a certain sort of dependence. So also at the commencement of a new state, unless the legislature puts the wheels of the constitution in motion, it cannot act. Neither executive nor court can do the work for which it was intended without some preparatory legislation. But, practically, the departments which have to do with special and particular actions, are as truly invested with the public sovereignty as the law-making department. The connection with physical might, through the command of armies and of an army of policemen, and the immediate control over foreign relations, are in the hands of the executive; it is natural, therefore, that this should strike the eyes as having the principal attributes of sovereignty. When it draws also the other powers into its circle, making laws and appointing dependent judges, it is, indeed, the sovereign *de facto*. But when the three powers are divided, it may happen that the judiciary which is physically the weakest, may, by a decision which asserts and defends law, show itself at certain crises to be the strongest arm of the state, simply because of its moral authority. The true opinion then is that none of these powers represents the sovereign more than another; that the executive, owing to the physical force which must be put into its hands, is the most dangerous and encroaching of the three; that in reality neither of them is sovereign except by catachresis, so that for once Rousseau is right in holding that the political community never gives up and transfers its powers, but always remains sovereign. Yet the large political community under a constitution never acts directly, except in the extremes of resistance to usurpation, or of revolution, or when, according to its own provisions, the constitution is altered.

There is in theory, as we have seen, a distinction and necessity of a division between certain departments of state, on which the safety and right action of the movements of the state depend. The legislative action is mainly general and prospective; that of the judiciary

Essential distinction of departments.

chiefly particular, retrospective, and explanatory ; that of the executive, particular and obedient to law and constitution. Yet nice lines cannot be drawn between the three : thus, legislative acts may apply to a particular case only, and judicial decisions may set a precedent for the future which practically will have the force of law, if not reversed. Again, the confusion between departments that is seen in small and early societies would imply intolerable despotism in larger ones at a later period; but the evil was small when in theory it appears the greatest. If a city-king was judge in chief, priest and military commander, and at the same time positive enactments were seldom made, our whole theory of division of powers was violated, yet as he had no soldiers but the citizens, as every decision could be reviewed by the entire community, he had powerful checks upon him in the absence of all *political* checks. In a more advanced society, when practically the Athenian people were judges as well as an ecclesia, and judges with a certain control over the amount of the damages and penalty in many cases, it seems as if the culmination of demagogy were reached ; yet the political crimes of the Athenian people were less than those of many states with better constitutions.

The three powers are not only distinct, but in representative, constitutional governments they are independent: they are all emanations from the ground-law, and two of them, the executive and judiciary, have no, or at least slight, control over the other or over one another, while they are engaged in their legitimate duties. Aristotle (vi. or iv., II, § 2) assigns to the ecclesia the decision concerning peace and war, making and breaking of treaties, making the laws, pronouncing the penalty of death, exile, and confiscation, and receiving the accounts of magistrates. We see from this passage what is plain of itself, that as soon as a representative legislature takes the place of the people or political body, its action will, of course, be abridged. In Aristotle's list of attributes part of them would fall, from sheer inability to discharge them, out of the hands of the law-making into the

Departments independent.



hands of one of the other powers. This would, of course, give greater relative strength to the executive, and some checks or other would arise, if a people were alarmed at the danger of usurpation or tyranny. The doctrine of the independence of the powers would be one such check, as far as public feeling was concerned ; that is, the nation would feel that a wrong and a usurpation was committed when this independence was attacked, and would the more readily take the part of the invaded body. But must there not be some other checks and constitutional provisions for securing the independence of the weaker or more assailable departments ? The experience of ancient states and of modern, especially within the states belonging to the Anglican race, has decided that there must be. What they are we shall see ere long. We only say here that the control over the purse and the sword, so as never to let it go out of their hands for long periods, is a principal one for the stability of the law-making power. As for the judiciary, a long history of endeavors to keep it in subservience to the crown in England shows how naturally an executive seeks to engross or to recover power; and the provision that the judges should hold office during good behavior was essential to the security of those liberties which were gained or saved in England by the downfall of the Stuarts.

Perfect independence, however, and perfect separation of functions are neither easy in practice nor desirable. Thus, a legislature and a court ought to have the power of arresting for disorders within their halls of session, which is an executive office, and the former, that of deciding in cases of disputed elections, which is of a judicial nature. In our constitutions the high power of impeaching any public office even up to the highest, is lodged in the legislature, the lower house presenting, and the upper trying, as a high court of impeachment. This was without doubt copied after the constitution of the British parliament, but had an independent caste given to it in the general constitution by confining the consequences of a verdict against the accused to removal from office. This, again,

But perfect independence of state-powers is not desirable nor possible.

is a judicial procedure. In one or more of the colonies, further, the upper house, like the house of lords, was a high court of appeals, a function now no longer pertaining to it, owing, perhaps, to the incompetence of such bodies to grapple with high questions of law. So also, as in England, divorce was granted formerly by many legislatures, which thus exercised concurrent power with the courts, and the same bodies to some extent had the pardoning power in their hands. What is more remarkable, as in England the judiciary, and as the Roman prætor by his edict, has a most important and most useful power of unfolding existing law, so as to apply its principles to new cases not contemplated in the original law or statute, and thus approach near to the functions of a law-making body. A slighter invasion of another province is seen when an officer of government, a finance minister for instance, lays down, for the interpretation of the revenue law, rules which must stand until a private person chooses to test their validity before a court. But the most remarkable case of a blending of powers is in the president's qualified veto, by which he overcomes a majority in the houses of congress of less than two-thirds, and which has been a very living part of our constitution; while the analogous power of the British monarch, which suggested it, has now become obsolete through the working of a government by responsible ministries. This is certainly not an executive act, yet it does not reach the positive character of a law-making process, but simply stands in the way of legislation. It is one of those checks of which the political wisdom of the Anglican race has devised so many, by which we violate theory in order to gain a practical end.

But is there not danger of conflict and encroachment, if the departments are equal or nearly equal; and  
Danger of conflict of departments. may not one of them, in order to get the ascendancy, commit unconstitutional acts, or, in a time when party spirit runs high, strive to alter the constitution? Without doubt there is some danger from this source. The great strife between Charles I. of England and the parliament led

to a civil war and to his execution, yet the struggle expressed the grievances of the country and the turn of public opinion under a somewhat unsettled constitution. Something decisive, therefore—some end of the struggle, was necessary, if England was to have a future history; and the actual end was surely worth the struggle. Under a government by a ministry conflicts involving civil war are not to be feared; the majority in parliament controls purse and sword; if the monarch was to take his own course, the ministry would be impeached, and parliament would prove strongest. The great danger in England and in our country—here more than there—is from corrupting influence, which is unavoidable so long as public men are assailable by corrupt motives. In the United States there can well be a contest between the president personally, and the legislature, arising either from a change of parties during a presidency, or from the peculiar temper of the chief officer. The only signal instance of this kind has been the contest between Andrew Johnson, president by the death of Mr. Lincoln, and the congress—a contest which ended in a well-nigh successful impeachment. Here the independent obstinacy of the head of the government created the difficulty. Another man, less honest and less dogged, might have sought to bring congress to his side by corrupt means. But this trial of our constitution served to show that no conflict between these coequal powers can seriously threaten the government. For the president must obstruct legislation by a veto, and if the people sustain him, he conquers; if otherwise, he must soon come to the end of his term of four years.

Most of the modern constitutional monarchies are so framed that, if a conflict comes, the sovereign can get the better of the parliament. Having been made under a dread of public opinion as an influence on public measures, and by political men attached to the principle of monarchy, these constitutions naturally seek a support for monarchy as the main moving power against a fluctuating public feeling. And there is still much of loyalty to the king as a person, as con-

tradistinguished from loyalty to the constitution. There will be no little friction in some of these machines sooner or later.

### § 216.

There is another question touching the division of powers—  
Can the executive powers be classed together? whether, namely, those which we called executive or administrative can logically be classed together? Is there a unity in the carrying out of the laws possible? For instance, is there any such relation between the war power and the finance, that they ought to be regarded as one or pertaining to one chief in the state? If they are one in such a sense that the same man has purse and sword in his hand without control, that is the end of free government, unless a device by means of checks prevents the evil which the constitution gives rise to. One might blame the clumsy scheme of a constitutional government which makes a difficulty as if on purpose to mend it; did not the same complication and need of check run through man's nature and much of his work? Simplicity and logical neatness are not the good to be aimed at in politics, but freedom and order, with props against the pressure of time, and arbitrary will, and sudden crises. The powers in their political exercise, as provided for by law, may or may not be put ultimately in the hands of one man; whether they shall or not is a question not admitting any one answer. Thus much may be said, that subordinate officials ought to be confined to the exercise of one kind of authority; it is safer to restrict them by law, rather than that the chief executive, as consenting to the acts of his subordinates, should be held responsible and be called to account in each case of illegality.

In treating of the executive among the departments of government, we must refer the reader to what  
Executive power and officers. was said in the section on the forms of government in relation to monarchy, hereditary or elective, and constitutional. In regard to the chief officers of state, the habits, traditions, and laws of each nation, together with their



past history, must decide who and how many they shall be, by what tenure they shall hold their offices, how much powder shall be put into their hands. As one who believes that the constitution of the United States is a very wise instrument, because it expresses just that which the States needed, and grew out of the historical state of things, I could not blame another nation for choosing a different form of government more suited to their circumstances, if under it liberty and justice, order and security could flourish. If a monarch were one of the necessary elements, so let it be ; we want no such chief magistrate, and could not have it if we wanted it. The great point is to have a stable set of institutions which a people are willing to accept. How much better this than to be groping for well-nigh a century under the control of theories, or the shifting winds of opposing parties, ever learning and never able to come to true political wisdom. What a satire on fabricated governments does an important part of modern revolutionary history present to us—what a testimony in favor of governments that grow !

The natural tendency in nations not democratically governed, especially if they have retained their primeval polity, is towards one supreme executive, on whom all other officers of administration and even the judges are dependent. And by dependence we mean that these are not only appointed by the head of the state, but salaried by him, removable at his pleasure, and in practice obeying his orders as subordinates. In democratical states, the tendency arising from the more direct sovereignty of the people, and its interference in public affairs, is to split up executive power to a great extent, so that there shall be as little of dependence of one magistrate upon another as is possible. And to supply that supervision which a hierarchy of officers in an absolutism can secure, the people appoints boards of control, abridges terms of office (for which the hankering after office may be another cause) and puts into the hands of a senate, or magistrate, or a private prosecutor, the power of calling the official to account for illegality or

Unity and plurality in the executive.

corruption. Athens was the most remarkable example of this breaking up of executive power into fragments. Thus, the treasurer, the generals, the archons, the petty police magistrates, and a host of others were entirely independent of one another, were liable to be accused, or required to present accounts or reports to boards like the *logistæ* and *euthyni*, and to be accused before assemblies of the people. So, in aristocratic Rome, consuls, prætors, ædiles, censors, tribunes, were under no law to obey each other's orders; each class of magistrates might be controlled by another class, but could only move within a certain tolerably well-defined sphere. This principle seems almost necessary for a republic, if it would not fall into the evil of a *personal* government ending in a *tyrannis*. In the separate states of our American system the same course is followed. The governor has little appointing or removing power, and his supervisory control consists chiefly in bringing officers charged with malfeasance to trial through the public prosecutors. In the general government the president has a place and relation to all officers of the government, except the judges, which even an old Roman would be alarmed at, and which now constitutes the chief motive, the central spring of our internal politics, as well as the chief danger for our national purity and stability.

Together with the splitting up of official duties and the almost entire want of subordination of office-holders among themselves, we find in a few states a duality of political officers with the same functions. Of this the Roman constitution affords to us the most remarkable examples, which first occur, as far as we know, after the fall of the kings. This duality differs from the plan on which, in aristocratic politics, executive councils are often instituted, where a majority of three, five, or some larger number, decides on all questions within the council's competence. The two Roman consuls, on the other hand, had each separately the entire power of their office, and were not bound to ask each other's counsel. The power of the kings was not cut in two and half given to each,

but each had the whole of it which belonged to the office ; so that they could easily block each other's proceedings and obstruct public business. The two lines of kings at Sparta resembled the consuls in some respects, and the principle of " collegiality," beginning with the consuls, was extended to other offices, such as prætors and censors. What its origin was is not certain. The two consuls, may have represented the *patres majorum* and the *patres minorum gentium* in the senate, or have stood for the king and the præfect of the city, it being desirable that one consul should always be at home ; but when the two annual chief magistrates were once created, the Romans may have seen in the duality a security against a tyrant. That, however, does not appear to have been an original calculation. A new reason for two chief magistrates was added, after the plebeians gained the right of having one of them selected from their order. The two Spartan lines of kings may be explained, without imputing this provision to any particular foresight, by the fact that two leading families, neither of them, perhaps, of Dorian extraction, were united in introducing order into the central body of the Dorian people. And afterwards, as Curtius remarks, the fact that two dynasties existed side by side offered the important advantage of binding two powerful parties and their interests to the state, and of allowing not only the Achæan population, but, according to a most probable supposition, the older Æolic, to find themselves represented in the supreme guidance of the state, and represented with equal rights. " Moreover, not only policy towards the conquered inhabitants led to this double kingship, but it was a guarantee for preventing, by means of the mutual jealousy of the two lines, a tyrannical outstepping of the royal prerogatives." (*Hist. of Greece*, i., 209-210, Am. ed.) It may be added that the two lines never agreed well together.\* The Carthaginians, also, had two *suffetes*, as we have seen. The plan of several concurrent

\* Aristotle accounts for the long continuance of the Spartan monarchy from the division of the chief power between two persons, and by the institution of the ephorate. (*Pol.*, v. or viii., 9, § 1.)

chief magistrates, with which, as we have said, aristocracies are familiar, was tried in several of the constitutions of revolutionary France. A directory of five appears in that of 1795. In that of 1799 three consuls appear holding for ten years and re-eligible, and the same *three* held office by the *senatus consultum* of 1802. Thus the way was paved for the empire. We find also that it was proposed in the convention for framing our present constitution, to have two officers, which was, happily we think, not approved.

There have been instances even of two sovereigns with dissimilar powers, like the two lately existing in Japan—one, the representative of the old sovereignty and the religious head of the nation ; the other the principal feudal chieftain, acquiring his high position in recent times, and reminding one of the mayors of the palace under the later Merovingians. We find again in aristocratic states sometimes a number of equal executive officers, a kind of council without a head, which governs with vigor and unity so long as the aristocracy is not divided into factions ; then one party generally sides with the people and overturns the government.

In modern times the tendency has been, both in republics and in monarchies, to have one chief magistrate—elected, in the former of these classes of states, for a short term of years, and in the other (not taking kings elected for life into account, since, with the fall of Poland, they have disappeared from Christian states), hereditary monarchs. The advantages of a single chief are obvious : he is able to bring unity and efficiency into his government, and, being alone, he or his ministry is responsible ; whereas, two presidents would be apt to checkmate one another, if they were of different parties, and would be jealous and rivals if they were of the same party. How long their term of office ought to last, and whether they should be re-eligible on the expiration of office, if at all, are questions to be settled with reference to the political feelings of the people. Our constitution gives to the president a term of four years, and lays no restriction on his re-election ; but the example of Washington, and a strong feel-



ing, united with a wise political tact, has made it to be regarded as a matter of course that, after two terms at most, he should retire forever from political life. Thus he would have eight years of very great power—more years than any Roman down to the end of the republic filled the office of consul. This is a striking example of a usage arising under a written constitution, and adding to it a special limitation. The formal prohibition of the re-election of the president after four or six years would remove some of the evils of the present system.

The chief magistrate who is not hereditary must be elected by the legislature, or by direct voice of the people, or in some other manner. Our plan is to appoint electors from each state equal in number to the two senators and the representatives of each state, who at a prescribed time meet at the place appointed, cast their votes, and choose some one to carry these to Washington. When there is no choice by a majority of votes, the house of representatives, voting by states, has the power of electing the president and vice-president. At first there was no special rule as to which of two persons should have the higher and which the second of these offices, but the rule was that he for whom the largest number of votes was cast should fill the highest office. Owing to an equality of votes cast by the electors, the election came into the house in 1801, and after protracted votings and much intrigue Mr. Jefferson was chosen. That gave rise to an amendment of the constitution, by which the two candidates were voted for to fill each a specific office, and thus all difficulty for the future was prevented.

The French, at different times, have referred the choice of the chief magistrate to the people and to the legislature. Since the fall of the second empire, this and other questions relating to the form of a republic have been earnestly discussed. M. de Laveleye, of Belgium, in his essay "*Sur les formes de gouvernement dans les sociétés modernes*," Paris, 1872, chap. 34, remarks that in 1848 the president of the republic, after the example of the United

Election of the chief magistrate by the people.

States, was elected by universal suffrage. "One must be blind," he adds, "not to see that this was to give the nation up into the hands of a master. In a country with the traditions of monarchy the president elected directly by the people will hold in his hands the destinies of the national assembly. To suppress it he will need only to give the word of command. The people does not comprehend any power that is not represented by a person; in their eyes the impersonal power of a deliberative body is a mere shadow. It is necessary, then, that the president must be named by the parliament. The election of the president by the people in the United States every four years calls forth a periodical crisis too intense for the European nations to endure.\* That would be enough to give a disgust for the republican regime. . . . Switzerland changes its president without attracting notice. Scarcely has she a functionary deserving of the name; but while in Switzerland the competence of the president is almost a nullity, in France it is universal, immense, unlimited. It is absolutely necessary for the parliament to have a legal and easy method of recalling [*i. e.*, deposing] the president, since temptations and encouragements to usurpation will not be wanting to him. The upper chamber should have the power of removing him from his place on the demand of the lower chamber."

M. E. Duvergier d'Hauranne, in his "*République conservatrice*" (Paris, 1873), discusses with ability the same subject at some length. (pp. 186-204). Some of his positions are that the relations of the executive and legislative powers cannot be regulated in an isolated way on abstract principles; but it is necessary to know how these powers will be adjusted to one another. The executive power cannot be constituted in the same way with two chambers and with one—with a chamber renewed in part at intervals, and with one the members of which go out of office together; "with a sovereign assembly invested with powers almost revolutionary and with

\* The crisis of a presidential election, and the feeling then excited, are magnified in the imaginations of the European writers on American affairs.

an assembly of the ordinary kind, modestly shut up within its legal competence." The different systems that are possible must be examined, must be accepted or rejected *en bloc*, without the hope of escaping from the common law and getting clear from the necessities laid on all known governments." There are two systems of representative government which offer themselves as examples to modern nations aiming at free institutions, the English and the American. The former or parliamentary monarchy leads to parliamentary omnipotence, and the only vestige of the king's ancient sovereignty is the right to dissolve parliament and appeal to new elections. If public opinion is on his side, he can find new ministers to aid him, for it is respect to public opinion which prevents the tyranny of a parliament as well as royal usurpation, and makes a free government out of a constitutional monarchy. The equilibrium of parliamentary institutions rests on this right of dissolution. Remove this stone, and you have nothing but an incoherent, impracticable system leading to revolution. Can this system suit a republic? M. Duvergier thinks not. The great error of the founders of the republic of 1848 consisted, according to him, in "wishing to make the office of president a species of republican representation of royalty," taking his position outside of parliamentary strifes; and to effect this it was necessary that he should be chosen directly by the people. This was attributed at the time to personal considerations, but it could not be otherwise, when once the president had been modelled after a constitutional king. For, if elected, with such attributes, by the assembly, he could not avoid becoming the chief of a party, attached, of his own will or by compulsion, to the majority which chose him, and obliged to put all his influence at the disposition of his friends. Popular election alone could raise the presidential power to the height desired. But, in accordance with this power and position, it was hardly possible not to give him the right of *veto* and that of dissolution. The first was given, the second was withheld; and hence the constitution of 1848 incurred the risk of preventing

him from using the only instrument of legal defence he could have,—the risk of organizing civil war between the two powers of the government and of provoking an appeal to force, of giving rise to a necessity that one should suppress the other. But it may be asked, our author continues, whether the president should not govern by ministers. To this he replies that the irresponsibility of such an office created by election is inconsistent with its origin and nature; so that his impotence would imperil the parliamentary government. It is the hereditary character of monarchy which gives rise to the axiom that the king can do no wrong. An elected president represents the nation as much, if not more, than a legislative assembly—he being chosen by all—while the several members of that are chosen by fractions of the people. If then, being a representative of popular sovereignty, he is reduced to the condition of a *fainéant* king; will he not be the more ready to burst the constitutional chains that bind him? “We know, moreover, by what very simple process the president’s chair turns into the imperial throne.” The English system, then, is not applicable to a republic. The prerogatives of a constitutional king are at once insufficient for the president of a republic, and are dangerous in his hands. There is need of an intermediate power to prevent conflicts between the legislature and the president; whose duty it must be to keep the two within their legal bounds.

This the Americans have sought to do by placing the senate between the house of representatives and the executive elected by the nation, armed with the veto and governing in person by irresponsible ministers who are not members of congress. The power of impeachment by the house, before the senate, our author thinks, is not illusory; and the senate on this and other accounts is the key-stone of the American system. answering to the right of dissolution in Great Britain. This, and the power of the supreme court in guarding and interpreting the constitution, are sufficient for securing the agreement of the constitutional powers in the United States. But would they answer the same purpose in



France? The author finds it difficult to believe this. The great and long struggles in the United States between the president and congress "are endured valiantly by the Americans, thanks to their long practice of political liberty, their great experience in the institutions of their country, and their imperturbable confidence in the employment of legal means. Could we in France be involved in such prolonged strifes, with the *sang-froid* which the Americans bring into them? We should need at least prompt solutions. Neither system, then, that of the English nor that of the Americans, ought to be copied. We can borrow something, but must not servilely imitate." "In spite of the contrary example of the great American republic, we must needs renounce the direct election of the president by the nation," . . . for "he will believe himself superior to the national representatives, as being the agent of the nation elected by universal suffrage. And since we do not wish any longer to confide to the country,—acting as a whole,—the election of the chief officers of state; the legislative body ought to perform this office. A power delegated by parliament will have its inconveniences and its dangers; but these may be remedied in various ways, and at all events, there is no other practical way of securing the preponderance of parliament."

The next question in order discussed by our author is, Whether the executive power shall be put into the hands of one or more persons,—of a president or of a directory like the body so-called in France, organized by the convention or like the Swiss federal council. His decision is that an unstable divided power is unfit to manage the affairs of a government centralized like that of France, and finds its place rather in a confederation. Its mobility, weakness and want of *prestige* would make it soon fall into contempt. "Nothing is more contrary to our genius than the institution of an anonymous and collective government."—We may add that the English race has never tried this expedient, whether because the single head of the state under the monarchy and the single governor in all the colo-

English race prefer a single chief executive.

nies and provinces gave the precedent; or because also there were practical difficulties in it which appeared on the surface. A committee of three or five men, in the president's place or in that of a governor, would command no respect, would often quarrel hopelessly, would feel their responsibility for executive measures less than one man would feel his, could hardly be deposed in mass for bad executive measures, and might intrigue against one another for a new election. And how feeble they would be in a crisis.\*

Mr. Mill, in his "Considerations on Representative Government" (chap. xiv., pp. 269, 270, Amer ed.),  
Mr. Mill on electing chief magistrates by the people. having laid it down as an important principle of good government that no executive functionaries should be appointed by popular election, by the votes of the people or of their representatives, asks whether the chief of the executive in a republican government ought not to be an exception. There is, he thinks, "some advantage in a country like America, where no apprehension needs to be entertained of a *coup d'état*, in making the chief minister constitutionally independent of the legislative body and rendering the two

\* Mr. J. S. Courcelle-Seneuil, well-known as a political economist, makes the following remarks on the mode of electing the president of a republic in his work entitled "*L'héritage de la révolution*" (Paris, 1872), pp. 203, 204: "In the eyes of most Frenchmen no political question is more important than that of the form of the executive power. In reality, however, this question is very secondary: the important point is that the attributes of this power be well determined and strictly limited. The executive power is charged with the application of the laws, and with busying itself in administrative details growing out of their application. It is then natural and regular that this be committed to a person or persons designated by the legislative power, in the form which to this power seems best. It is even prudent not to determine this form by a fixed constitution, but to leave this care to the different legislatures for the time of the continuance of each one of them. It is enough to know that the executive power is constituted by delegation from the legislature and is subordinated to it, in order to render dangerous conflicts almost impossible," [and in order, we may add, from the American point of view, to weaken confidence in the stability and vigor of the government.]

great branches of the government, while equally popular in their origin and in their responsibility, an effective check on one another." The plan accords with the sedulous avoidance of the concentration of the great masses of power in the same hands which marks the constitution of the United States. "But the advantage is purchased at a price above all reasonable estimate of its value." Mr. Mill thinks it better that the chief magistrate in a republic should be appointed avowedly, as the chief minister in a constitutional monarchy is virtually, by the representative body. For this opinion he gives two reasons—first, that the president thus appointed would be sure to be a more eminent man than one elected by the people; and again, the great mischief of unintermitted electioneering would be prevented. "If a system had been devised to make party spirit the ruling principle of action in all public affairs, and to create an inducement not only to make every question a party question but to raise questions for the purpose of founding parties on them; it would have been difficult to contrive any means better adapted to the purpose." But Mr. Mill is not prepared to admit that "at all times and places it would be desirable to make the head of the executive so completely dependent upon the votes of a representative assembly as the prime minister is in England." "If it were thought best to avoid this, he might hold his office for a fixed period independent upon a parliamentary vote, which would be the American system minus the popular election and its evils." He ought to have also, Mr. Mill thinks, the power of dissolving the parliamentary or legislative body placed in his hands, for with this arm of independent action he never could be unduly dependent on the legislature.

The objection to our system which is made by Mill, that the ablest men cannot get into the presidential chair, for the reason that the most eminent men have to encounter local or personal prejudices, while a man without antecedents, being without enemies, is the best candidate of the party, was made by M. de Tocqueville, and has real

Mr. Mill's views  
examined.

weight. When put in its rudest form, it would be rather that an obscure, than that a less able man, is chosen for the reason just given. There is no desire on the part of a convention which selects candidates for a party to avoid able, judicious, or upright men ; but there is a desire to prevent defection or disaffection by forbearing to nominate a foremost man whom other party leaders dislike. And does not the same motive act when a new ministry has to be constituted in England ? Have there not been men necessary to a party who would not serve under a particular person thought of as a prime minister ? The evil is a great one, I admit, and is a consequence of party government as connected with popular elections ; but the wisest man in the place of secretary of state or of the treasury would have as wide and as influential a field of action as in the president's chair, so long as he could retain the president's confidence.

The other objection of " unintermitted electioneering " incident to popular elections is also an evil ; but it is overstated, when it is said by Mr. Mill that " when the highest dignity in the state is to be conferred by popular election once every few years, the whole of the intervening time is spent in what is virtually a canvass." There have been several elections when the minds of the people have been greatly roused and deeply anxious ; but this was owing to the importance of the crisis, as when Mr. Lincoln was canvassed for ; but it is remarkable how soon the agitation subsides. There are worse evils than Mr. Mill's telescope has discovered, attending on our system from the management of parties, which we intend to consider under the head of party government.

But, while admitting the justice of the criticisms on our mode of electing the chief officer, we cannot be persuaded that Mr. Mill's recommendations ought to carry much weight ; especially as they have no experience to support them. As for election by the legislature, to which the French political writers incline, because they have had unfortunate experience of national elections of a chief magistrate, it is to be feared that it would be a source of great corruption ; men who



had votes in their hands would bargain for places for themselves or their friends ; a system of intrigue on a vast scale would be initiated which would have disastrous consequences—of intrigue not only between members of a legislature and agents of candidates, but of intrigue of politicians desirous of getting a place in the body which was to choose the chief magistrate. And as for the proposed power of the president to dissolve the legislature, few persons, we imagine, would hesitate to regard the exercise of such a power as dangerous in the extreme. That might be done without agitation, where the head of the state held office for life ; but for a magistrate having four or six years of political existence to use such a power, when the legislative body would go out of office within perhaps a year, would be regarded as a stretch of authority altogether out of proportion to the end aimed at. Would Mr. Mill have recommended in our case that the president should be empowered to dissolve the senate also ? If not, there would generally be one chamber opposed to the administration, and no good would come out of the dissolution. If so, the country would be thrown into the hands of the executive without a check.

On the whole, then, whatever might be best in some other country with other political habits and traditions, we do not see how our system in this respect can be altered for the better. The election takes place after the composition of the next house of representatives, if not already known—can be judged of with high probability. It takes place long enough before the elected magistrate occupies his seat, for the minds of the community to cool. It is acceptable to a party diffused through the union. No person's private interests except those of office-holders depend on the result.

### § 217.

In the ancient city-states the people held appointments in their own hands. Either there was no chief executive officer, or, if there were, he had little or no appointing power. The people by election—as in

Appointment of  
subordinate officials.

many cities, or as at Athens, in the case of some offices by show of hands, and of others by lot, or by lot following the preparation of lists of eligible citizens, as at Florence—determined who the officials for the year or the term should be. Aristotle gives it as a mark of advanced democracy that the lot was used instead of *cheirotomia*. (vi., or vii., I, § 8.) The Athenians wisely abstained from applying the lot, as a universal rule, several of the principal functionaries of the state and the extraordinary commissions being exempted from its operations. It was introduced, perhaps, to prevent coteries and aristocratic factions from carrying their projects through magistrates of their own choosing, and it found favor, perhaps, by the opening which it made for the poorer classes into political places, otherwise inaccessible to them.

Rome never drew the lot for its officers, and to a great extent kept them from any subordination to each other. In the army the commander could select some of the military tribunes (colonels), but the state chose the rest. It is remarkable that, although vast powers were entrusted to the leading magistrates, the Romans, by the number of co-equal ones, by the short term of office, by the checks they could use upon one another, by the authority of the senate, long prevented the rise of a tyrant or of a coalition aiming to control the state.

In the republics of the middle ages, elections for very short periods, as for two, three, or six months, were made by the qualified electors, and sometimes by very complicated processes. An approach to the lot, such as it was at Athens, is seen in Florence when the constitution ran into the more democratical channel. (Comp. § 188.) The Florentine *squittinio*, however, drew the names from a certain number of citizens, many being excluded for different reasons, and the management of it became extremely dishonest, so that the reigning party in the later times of the republic gave office under this form to whom it would. In all the republics, I believe, a subordination of officials was wanting in great measure. All of them depended immedi-

Elections in middle ages.

ately on the towns themselves. In countries where kingly power became strong, if the charters had given to the towns the right to choose their mayors, the kings to some extent acquired the power at length of nominating them as well as of having a controlling voice in appointing the members of the town councils.

In most modern governments, whether constitutional or not, the chief executive has the appointment of all, or nearly all, the officers employed in the service of the state. Appointments of officials in most modern governments. It seems highly proper and even essential that the administration properly so called, the cabinet, should be under his control, both as it respects appointment and removal. The English monarch exercises this power in a certain subjection to public opinion. If the dominant party insisted that a certain man should be prime minister, it could not well be otherwise, and the prime minister has the composition of the cabinet in his hands; yet he must have a certain regard to the wishes of the sovereign and of his colleagues. The President of the United States chooses his cabinet subject to the approval of the senate, but can dismiss them by his own free act. Their number, and for the most part their functions, their salaries, number of clerks and other particulars are determined by law. In constitutional governments where royal power is still strong, everything is in the hands of the sovereign, who, however, will naturally act through his ministers.

The modern practice is, and in fact the universal practice has been, in well-constituted and efficient governments, to divide the state work among the Cabinets. ministers in such a way that each shall have his department or portfolio, and none shall intrude into another's province. In this way each is responsible for the success of his department, the blame for slackness rests on him; and if peculations, betrayal of secrets, employment of wrong agents, or other misdeeds occur in connection with his department, to him the fault is imputed. The cabinet also serve alone, or in connection with a council, as the advisers of the chief magistrate in

all important matters. For instance, if there is a threatening of foreign war, the foreign secretary alone ought not to be consulted; but as war affects the whole state, those who have charge of its several interests and are nearest to the chief executive officer, ought to know and are bound to take their share of the responsibility. If this were not so the cabinet would be a set of agents doing their work as upper clerks. This would be the end of constitutional government, which implies not only that each shall be responsible in his sphere, but that all shall be advisers together, responsible together, in all important transactions.

The number of ministers and apportionment of work are subject to no rule, but depend on the peculiar interests and constitution of each particular country, which will assign more business to one department and less to another than the same department would have among its neighbors. The technical division into civil, military, finance, judicial, and police made by some writers of the last age—besides being untenable in itself as putting the judiciary where it does not belong, and grouping business of several different kinds under police—is in practice wholly untenable. Foreign affairs, military and finance, will each demand a chief of department. Whether the navy should be under a separate chief will depend on the importance of this interest. Some states have a chief of police coequal with the other great officers of state; but the importance of this department is a sign of a bad constitution. The business of education, of carrying the mails, of protecting religion, have been all of them exalted into departments in various countries. There ought also to be law officers who hold confidential communication with the departments, and one at least with the cabinet, as an adviser and agent in public prosecutions.\*

\* The cabinets of modern European states consist of the ministers placed over the distinct departments, besides whom there may be a privy council. The number of ministers forming a cabinet varies from six to over ten. Thus in France we find ministers of foreign affairs, of justice, of the interior, finance, war, the navy, public instruction ;



As a great number of chiefs of bureaus and clerks are necessary for the transaction of business, a responsible minister ought to have power to decide who his own subordinates shall be, rather than be governed by the chief magistrate in this respect. In dismissions from office also the most responsible persons should be invested with sufficient authority.

The habit of turning out of office for party reasons a competent and faithful inferior officer, although it may not be possible entirely to prevent such an exercise of power, cannot be too severely condemned, as a general practice. And here we come to one of the most serious evils in the practical workings of those free governments where party spirit is the principal driving-wheel in

of religious affairs (*cultes*) and the fine arts, of agriculture and commerce, and of public works. Italy has nine ministers with nearly the same functions. In the Prussian cabinet there is no minister for the navy; agriculture gives title to a minister, commerce with industry and the public works to another, and ecclesiastical affairs with public instruction and medical affairs, to another. Russia, again, with a grand council, chancery, and senate, has a central administration to which belong ten ministers, and of these the ministry of the court, that of the domains, that of ways and communications, are unlike the others spoken of already. Great Britain has no exact distribution of offices in the cabinet. The first lord of the treasury and the chancellor of the exchequer—offices sometimes committed to the same person—the home, foreign and colonial secretaries, the heads of the boards of trade, of control and of the admiralty, with the postmaster-general, the president of the council, the lord chancellor, and the secretary for India, with one or two others, generally make up the cabinet; but practical considerations may add to or take from the ministers. The chancellor of the exchequer or the first lord of the treasury is generally the premier. Our cabinet in the United States is made up of the secretaries of state, the treasury, war, the navy, and the interior, with the postmaster and attorney-general. The secretary of the interior is a modern addition. It is seen from this diversity that nothing but practical considerations decides how many and what officers shall belong to a cabinet. It seems to be important not only that the great interests of a country with the relations of the government to the laws and constitution should be represented, but that cabinets should be large enough to be able to bear responsibility before the country, and to carry with them a great weight of authority.

public affairs. We are obliged to illustrate it by that which is of constant occurrence in the United States. For some time after the present government began, it is believed that inferior offices were never given or taken away on account of party differences. But, as time went on, it became evident that the spirit of party was destined to control the general government and that of the states, more and more ; those persons who had been actively serviceable to a party began to think that they had a right to a reward from the party ; and as no other reward on a great scale was possible besides the emoluments and honors of office bestowed on them, or at their request on their friends, there must be, in a revolution of parties, a general displacement and reappointment, so far as the offices were worth having. Meanwhile, with the rapid growth of the country, the number of offices grew immensely, and with the feeling that office was the reward of party services, the successful candidates for congress everywhere were appealed to by those who had helped to put them in their places, for the payment of their wages. These, in turn, solicited the chief magistrate at Washington and the heads of departments, for their creatures, and it began to be thought and believed that every member of the national legislature had a right to insist on being, within his district, an almoner of the government. To these claims every recent administration has been obliged more or less to yield. The attempt to introduce a system of civil service based on competence and character, has not as yet succeeded. The country and the government cannot, without extreme difficulty, get out of this rut of corrupt political bargaining ; the best nominations must often be defeated ; men otherwise worthy have to be agents for the reward by office of those whom they despise ; independence and personal honor are gradually driven out of politics. The whole business is inconceivably disgusting, it is believed, to many, who know it best but are forced along against their will into appointing or recommending persons in whom they do not confide. In the states the appointing power is small, but here elections being in the hands of cau-

cuses and conventions, these are manipulated so as to reward those who have worked hard for the party. It will appear, when we come to speak of parties in free governments more at large, what a great evil thus hinges on the power of the administration over inferior appointments, and how many evils, political and moral, follow in its train. At present, we ask whether a cure is possible? The constitution itself fastens the evil upon us, so long as the power of removal is uncontrolled. If a president has the best intentions to bring up the civil service, the next successor or his cabinet can make wholesale removals, and the worth of the incumbent will not protect him if the office is worth having. A good system, which we fear can never be entirely carried out, would embrace these among other provisions. (See § 273, on parties in the United States.)

1. The cabinet officers, their chiefs of bureaus, the representatives of the country in foreign lands, some of the leading custom-house officers and postmasters may properly belong to the victorious party.

Right rules for  
civil service.

2. The immense multitude of postmasters in smaller places may well be elected by the communities for whose good they are instituted, the people of the place giving security to the government for the faithful performance of their duties. Although they are a division of the army of public officers, they have a local character, and may be treated as other local officers are treated.

3. The inferior officers of customs, and others whose duties are of a permanent character, ought to give bonds and hold office during good behavior.

4. Government clerks, consuls and consular agents, perhaps also the inferior diplomatic officials, may receive an appointment on their first entering into the service of government, subject to their sustaining an examination satisfactory to a certain board. If they show themselves to be able and trustworthy they ought to be invested with the office, and may be promoted without examination, but not removed so long as they are faithful and competent.

5. The power of removal must not be taken away from the government, but it must be based on sufficient grounds, and the person so removed may, if he demands it, have a trial by which his case shall finally be determined.

6. No petition to the president or a cabinet officer for the appointment of any one whatever to any office should be presented by any member of the national legislature, or by any other person except in writing, and with his testimony to the moral character and ability of his nominee.

In parliamentary governments a considerable evil arises from frequent changes of ministers. There have <sup>Frequent changes of ministers.</sup> been in England since 1830 fifteen or sixteen different cabinets. It is impossible that many projects, on which great care had been bestowed, should not have fallen through, and the progress of the country in some important respects considerably retarded. It has been proposed, in order to remedy this evil, that some of the ministers should be elected by the legislative chambers on the basis of not retiring with the rest of the cabinet, and with a certain fixed term of office. England, it is said, cannot reorganize her army because there is no steady plan that can have a number of years in which to be matured. MM. Guizot and Duruy in France began important reforms in the department of instruction, but left their posts without bringing anything to a final issue. It is shown by experience that a good minister, sustained by an enlightened despot, can effect much more than an equally able man, whose place depends upon the majority in a legislative assembly. And in the United States, where the cabinet officers are in no way responsible to the houses of congress, a power of free, continuous action is within their reach, which they could not have, if they were liable to be turned out at every change of public opinion. Moreover, if they hold such relations to the legislature they ought to be members of it, or at least to be able to appear before it and defend the administration against their adversaries. All this is true, but we see no prevailing reason for such an innovation. The point is to be settled by weighing the advantages and evils



of the two plans against one another. Our system of bringing the president into communication with the national legislature by messages, and of not representing him there by the presence and voices of the heads of departments, has serious evils attending it; among which, the fact is not the least, that it is possible for a feeble man to hold his place in the cabinet, while confined to his official duties, when he would sink into disrepute if not able to stand the brunt of opposition in defending his measures before congress. But the plan of having two kinds of ministers—some, members of the official body and champions for their colleagues, others, men of rank, chosen by the legislature and holding office for a time without close connection with the reigning party,—seems to be still worse. How could there be unity in a cabinet under such a system? Would it not take away from the chief executive officer a part of his necessary influence? An author who advocates this gives, as instances of the permanent part of the ministry, the chiefs in the departments of war, public instruction and public works. The first of these seems to be eminently a cabinet or party officer, and he is one who, if not with the administration, might do serious harm if he disapproved of a war which they favored.\*

In the ancient city-states the assembled people in the law-  
Legislative de-ful meeting kept the law-making power in their  
partment.own hands; and yet sometimes wisely put limitations upon their capacity of proceeding to the act of legislation without preparatory advice. Thus at Athens a *probouleuma* of the senate of five hundred was necessary before an act relating to something special—a psephisma—could be passed; and if a law (a *nomos*) were to be altered, or a new one introduced, it was necessary, and indeed was one of the

\* See Laveleye's essay before cited, chap. xxxvi. It is quite possible to take away much of the patronage of the government, which Laveleye justly regards as dangerous, without doing what might bring anarchy into it. For instance, if public instruction must be superintended by government functionaries, might not every municipality or school district elect its own committee for local purposes?

few provisions of what we should call the Athenian constitution, that a large committee of law-makers (*nomothetæ*) should examine it, that it should be put on trial before them, so to speak, and then first be submitted to the assembly. At Rome the senate, besides other powers, could pass decrees relating to various parts of the administration, which answered to some of the business that now comes before legislatures. Yet a *rogation* or law proper,—so called from the question put to the people in the comitia by the presiding officer whether they would accept of a law, was outside of the senate's competence. In order to come before the comitia the project of a law needed to be announced beforehand, but the same comitia of the people before which it first came could make it become a law, and the senate had no authority to prevent its passage. The checks to hasty legislation lay in the arbitrary power of the presiding officer to retard the passage of a law, to refuse to put a vote, and to prorogue the assembly *re infectà*; in the *intercessio* of a tribune and in the influence of the senate. When the people's power passed over to the emperors, the general rule was that *quod principi placuit legis habet vigorem*; but the senate also, subject to his approval, could pass acts which were binding as laws, and he was practically checked in the exercise of his law-making power by the learned lawyers who belonged to the *consistory* and framed his rescripts. In the same way substantially despots without parliaments have since managed.

The original type of the assembly among a number of tribes and nations has already passed under review. When the Roman empire was reconstructed, the old assemblies of the *gau* and the kingdom could not be convened for judging or for making laws. The Frank kings had their councils where laws were proposed and in a manner accepted, but what was done could hardly be called legislation. Still we find that after the new kingdoms of Germanic origin had been constituted, the leading powers in each nation participated anew in the making of laws and the management of public

affairs. The new assemblies took the form of deputations of estates which the kings summoned, when they saw fit, for the purpose of asking gifts of them, and they in turn presented petitions for grievances. The estates were three, nobles, clergy and cities, to which in some countries a fourth, that of the peasants or free, but not noble, landholders were added. This estate was instituted in parts of Germany and Scandinavia; and in Sweden it continued to subsist by the side of the other three until within a few years since, when out of the four a parliament of two houses was constituted,—the burghers and farmers forming one house and the two remaining estates the other. The estates had diverse fortunes in the several countries of Europe. Spain ought to be mentioned because of the relatively greater number of the deputies from the town, the clergy and nobles not being inclined to attend. Sometimes these three classes met together, sometimes they met apart; so that the union of the three as one body in France, just before the outbreak of the revolution when they were called together for the first time after the year 1615, had a precedent. The power of the king, to call or neglect to convoke the estates, generally prevented their full development into an element of the governing power of the countries; and the kings still retained the law-making power in their hands to a considerable extent. Yet in some countries the estates were expressly recognized as having a share in the laws; and so far did the sovereigns part with power in their distress that the duke of Lauenburg agreed, if the estates would pay his debts, to contract no more without their leave,—accepting also other onerous conditions, confirmed by giving them the right to depose him if he should break his word.

## § 218.

England has had a different course of political development, as it respects parliamentary power. Not to repeat what has been said in the sections on the English constitution (§§ 171–174), we comprise the leading

Progress of the parliamentary power in England.

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particulars of this progress in a brief statement. The privileges, gradually gained by the house of commons, of deciding on the validity of elections into their body, of impeaching obnoxious ministers, of freedom from arrests ; the practice of short, specific appropriations ; the representation of public opinion, which has grown with every reform and which quiets the mind of the country, because the house can be the organ of all political measures and of all changes in the fundamental laws ; the necessity of annual sessions and of a dissolution after at least seven years—these and other characteristics of the house of commons make it probably the most dignified and the safest legislative assembly in the world.

### § 219.

In considering the theory of government, we have been obliged to look at the relations of the representative to the immediate constituency. We may now assume that he stands in their place to the extent that the powers of deliberation and of decision, which they would have, could they assemble together in a deliberative body, are transferred to him ; that if they would be bound to come to their decisions in view of the interests of all, he is so bound also ; that he can make, according to a right estimate of his duties, no absolute pledges requiring him to support a particular measure or party ; and that he may even be bound to oppose the measures of his party, to change his convictions and change his vote without being bound to resign his place. He represents, as one of many, the whole country. The object of election is to decide who is the wisest and ablest man within reach to take this post—who can do most good to the country if chosen. But the public good consists of two parts—the common good and the good of each particular district or represented community. These will not be inconsistent with one another, generally speaking ; but at times they will appear to be so, and it is desirable to find men of broad minds who can take both into view, and estimate duly the bearing of measures on both. There must



be parties, but in advocating particular measures the representative must no more be a partisan than he must seek the interests of only one particular place or district.

Hence, if it were possible for the whole country to choose all the representatives by a general ticket, and to have wisdom enough to do this, no better mode of selecting them could be desired. They would be chosen out of the number of the wisest, wherever they could be found, and with the fewest local jealousies. But only a community of angels could do this. The people in the best educated lands, where they are trained up for the duties of political life, know little of the men fit for serving the community who live three hundred miles away from them. How could they intelligently cast their votes for one or two hundred strangers? The more democratic the people, the lower down suffrage descends, the worse things would be. We may lay it down that general tickets are undesirable both for this reason and for a reason of still greater importance,—that they shut out the opinion of the minority from having any weight whatever, and in this way carry the principle that the majority shall govern to a rigorous tyrannical extreme. They prevent light from being thrown into legislatures, they render the minorities disaffected, intriguing, possibly rebellious.

Small districts, returning each its member, are then far to be preferred ; they are what now the practice of all free states accepts. But still difficulties and inconveniences stand in our way. It can and often does happen that opinion is concentrated in one place and diffused in others. Hence an actual majority in a state may have a minority in the chamber or chambers. Let there be, for instance, one hundred and twenty districts returning two members each, of which one hundred give, on an average, a majority of one hundred votes to the candidates whom they elect. Here we have a majority of ten thousand. But it is quite conceivable that each of the other twenty may give, taken together, a majority of eleven hundred votes to their successful candidates. Here we have twelve thousand more votes given by those

twenty districts than by the one hundred, while they are overcome in the legislature on every important question by a majority of one hundred and sixty. It may indeed be said with some justice that a diffused opinion over large districts of a state or nation is more likely to be right than an overwhelming one in a few districts. It may be said also that things will rectify themselves in the long run. But this is not entirely true; for certain interests may pertain more to one part of a state or country than to another; we may affirm then that elections in small districts do not always represent public opinion or public wisdom, and may give an undue power to the minority.

What weight ought to be attached, then, to the views of the late John C. Calhoun, whose consecration of his life to the defence of slavery should not blind his countrymen to his great ability? His opinion was that interests ought to be represented, as such; that a majority will choose its executive, appoint its judges, through them interpret the constitution, have the legislature at its disposal, and thus in fact oppress the minority. The remedy would be, he thinks, to give to the great interests their representation and to assure them of power enough to defend themselves and make themselves heard in public places.

That every interest which is of any national moment ought to find some advocate in public councils I freely admit, but it is impossible to represent interests, especially when not concentrated but dispersed over a wide tract, by any method conceived of when Mr. Calhoun wrote his "Essay on Government." On the plan of making a constitutional provision for them, we should soon fall into hopeless embarrassments. The cotton interest and the sugar interest, and, in general, the slave interest could protect itself by its concentration; nay, it actually governed the politics of the country more than all others, because it was locally united, and bred up men whose leisure could be given to politics. But how would it be of the shipping, or the iron or other manufacturing interest, or the great agricultural one? And if any of

these had a claim, would not the great mass of consumers have a greater? Mr. Calhoun's plan of giving protection to interests seems to be but another application of the protective policy which he justly rejected. We should have in this way opposing, even warring, interests, made perpetual by a constitution, and the country permanently divided up as far as law could make such a division.

§ 220.

Far more feasible is minority representation, if only it could take a simple and practicable shape. If practicable, it can be applied in all kinds of elections, for political and municipal officers, for representatives, and in the elections of private corporations, wherever, in fact, the persons voted for on the same ticket are more than one. This would require that many laws and even constitutions should be modified, and it will, without doubt, take some time before the rude, unjust rule shall be superseded, that the majority of voters, without respect to the wishes of the minority, must decide.

As this subject has been very much discussed within a few years, it is not strange that many projects have been brought before the public,\* the principal of which are the following:

\* The literature of this subject may be found in M. Laveleye's essay "Sur les formes de gouvernement," but he has omitted some works and papers. Some of the principal are "La question électorale," Ernest Navile, 1871; Thomas Hare, "Treatise on the Election of Representatives" (1859, ed. 1); H. Fawcett, Mr. Hare's Reform Bill Simplified and Explained; Walter Bailey, "A Scheme for Proportionate Representation," whose views are recommended by the Marquis of Biencourt, in the *Correspondent* (June, 1870), and by M. Navile in his "Réforme électorale en France;" Simon Sterne on "Representative Government and Personal Representation," Philadelphia, 1871; Mr. Barculow's, proposed in Congress and through the press; an essay on minority representation, by D. D. Field, in the *Journ. of the Amer. Social Sci. Association*, No. iii., for 1871, with several other essays on the same subject in the same number; "De la réforme électorale," by Rolin-Jacquemyns, Brussels, 1865; an article in Bluntschli's *Allgemeines Staatsrecht* "xvi., 492, Munich, 1863;" Mr. J. S. Mill's work on representative government, chap. vii.; Prof. Craik's (see text). A number of these essays I have never seen.

1. The cumulative plan, which consists in casting as many votes as there are candidates, and being allowed to cast all or more than one for the same person. Thus let there be three persons to be voted for, and let the parties be one thousand and five hundred. The minority, by throwing all their strength upon one name could be sure of returning one representative. But small minorities would still be of no account.

2. Another plan, first proposed by Prof. Craik, of Belfast, is that there are three places to be filled, but no one is allowed to vote for more than two. Thus if, of fifteen hundred voters, one thousand return the candidates A and B, the minority, consisting of five hundred, can return the other. But in this case, by the proper management, the majority could overcome the voting power of the minority, if the numbers deviated farther from equality than in the case supposed.\* This plan could also be combined with the first mentioned. It has been put to trial in the English reform bill of 1867, in regard to certain boroughs returning three members to parliament.

3. Another plan, devised by Mr. Walter Bailey, is "a scheme for the proportional" or uninominal vote. Here each elector casts a single vote, and it may happen that such a number of votes shall be thrown for a single candidate, as may be far more than enough to secure his election. The candidate is allowed to publish beforehand a list of names of such persons as may in succession receive the benefit of votes beyond his necessary quota, which thus are put to their account. Thus the number of votes necessary to elect him being one thousand, the next thousand of his surplus goes to B, the next succeeding to C, and so on. This plan would involve an arrangement of electoral quotas much beneath the majority of votes to be cast, and the giving of power to a popular candidate to say who should be his associates, the latter of which

\* That is, if the majority could command a single vote over three-fourths, it could carry the three candidates. Thus let the voters be 1600, and the majority 1201, they could cast 800, 800 and 802 votes, but the minority only 798.



characteristics does not accord well with the idea of independence on the voter's part.

4. Mr. Thomas Hare's plan, which has been advocated by Mr. J. S. Mill, Mr. Fawcett, the political economist, and by many others, has the following features : Every voter places on his list the name of his first choice at the head, and afterwards others whom he would accept as his representatives in the order of his preference. There is to be a fixed electoral quota of votes as in the plan last mentioned, and the elector, in selecting his subsidiary candidates is not to be confined to his own district, but may range all over the country. When the votes are counted the person having the quota is elected, and his surplus goes to the next following, and so on. In this way every vote will tell for the measures which are favored by him who casts it. The plan will tend to elect the person who is the voter's first choice, first, and others in their order. It seems to be just ; it represents the country, not the district ; and it is proportional. Fifty thousand voters in a party can return fifty members, if one thousand elects one, and these will probably be the best members of the party. Yet with these advantages the plan labors under very serious disadvantages. How can ordinary electors select ten, not to say twenty or fifty names of persons by whom they would wish to be represented, in the order of intelligent preference ? The result, probably, would be less independence, a more compact system of instruction given by preparing committees to the electors whom to choose than now. Add to this the work of counting and arranging, which would be far greater than at present. It is needless to add that to the election of single officers it would have no application, an objection which applies equally to the other three which have been mentioned.

#### § 221.

There are two ways of choosing representatives and executive officers, when a constitution places the right of choice, not in the hands of another power, but of the people, or voting part of the people themselves.

Direct and indirect  
elections.

One is the direct method of reaching the result ; the other, the indirect, that of appointing proxies who are to finish what the voters began. It seems a strange thing that any man should be pronounced unfit to elect his representative who is fit to elect a proxy. The elector ought to have no power to vote at all, or to have the power of full and final choice. It is a distrust of the people, when this half-way measure of electors acting in their place is preferred by a constitution.

Nevertheless, there are those who would introduce this double election, or election with two degrees, into the machinery of the state. It is said that the less enlightened classes of freemen are incapable of choosing those representatives (or, indeed, those officers of government) who are best fitted for defending their interests and managing public affairs. They necessarily vote as others instruct them, and thus only reduplicate the power of demagogues. "They are therefore only a machine—a dangerous machine, as being very powerful and very blind." Let now these same persons name others of their immediate neighborhood to act as their deputies, and select the representatives with a wider knowledge of men and of political measures. The probability is, it is claimed, that a much better class of legislators would be chosen.

The proposition is, however, to be condemned on two accounts. It is, in the first place, not a practical one. Those who have political weight enough to cast votes, will not be content with this remote connection with the active managers of public affairs ; they will insist on making their own elections, and if they have the power already, will not yield it up. Again, the indirect election, or that of two degrees, would naturally produce indifference to the exercise of the right conferred on the voter. He is separated from the important result on account of his want of intelligence, and thus merely decides who, in his judgment, is best fitted to exercise political rights in his place. He will therefore feel little interest in the result. Or, if he does take a warm part in them, he will bind his deputies to do his will, or be sure

beforehand that they think with him. Thus, either apathy or a complicated method of reaching the end, instead of a simple one, would be the consequence. The true opinion is, that if there is any tolerably accurate dividing line, between those who can make an intelligent choice and those who cannot, the latter class ought not to have the privilege of voting. The elections are made in order to find out the most capable and upright men, the best qualified to make laws and to manage public affairs. No man has a right to vote, or else all ought to have it. If there were such a right, irrespective of property, character, intelligence, it would be more true to theory that it should be exercised directly, rather than that the most important end to be attained—the choice of the lawgiver or executive officer—should be left to the will of others.

The election of president of the United States by electors Electors of president in the United States. and not by popular vote, is not indirect election; because the parties for the different candidates have, each of them, their electoral tickets, and no elector thinks of casting his vote otherwise than as those who chose him intended. The electors, again, never meet in a body; they have no joint deliberations which shows that their function is merely ministerial. The plan looked towards the casting of votes by the people, as citizens of states, and not as a whole community, which is shown by the two votes that every state possesses besides those determined by their relative number of representatives. If, then, the people as a whole was evenly balanced between two candidates; the smaller states, (it might be,) and hence the minority of the voters, would decide the election. The idea, then, of a majority of the population in the union was not in the minds of the framers of the constitution when they adopted this plan, nor yet of a majority of the states, but they seem to have aimed at a *tertium quid*, an election in which the state principle and the United States principle should be blended. It is not improbable, however, that they *intended* also to make the electors responsible for their votes, as they gave them the

power of voting for whom they would. But, if this were so, the plan was so far forth a failure ; since men selected for so important a duty by a party, and not meeting as a body nor required to deliberate together, could not have the cohesion and common action of representatives. They are qualified to be and are merely agents, and as such have no responsibility separate from that of their principals.

But although direct election ought to belong to the citizen capable of exercising political rights with intelligence, under the reign of universal suffrage something like indirect election prevails. We refer of course to the fact that, in democracies, where the party principle is strong, the voters find all the candidates chosen for them by irresponsible men meeting in a caucus or convention, and governed quite as much by personal as by patriotic motives. A sufficient time before an election a convention is assembled, to consider what candidates for state officers shall be proposed for the party, and a list is published embracing all the principal officers of the state. Then, a day or two perhaps before the election, another caucus determines the candidates for the legislature, or only those for the house of representatives. Not one in a hundred of the voters has his opinion asked in regard to the selection ; many of the names are those of unknown persons, some of them, those of persons in whom their neighbors have no confidence, but who must be floated onward by the general popularity of the ticket, and by the habit of voting *en masse* for all the names upon it. This is a description of what is happening in hundreds of districts and towns and in all the states of this union. Nor is the evil confined to the United States. M. Courcelle Seneuil gives us an account of a similar state of things in France.\* “With this form of election,” says he—that is, with the direct vote—“the elector cannot know the candidates between whom he is called to choose. They are at a distance from him ; he has never seen them, and prob-

Universal suffrage brings a kind of indirect election with it.

\* Héritage de la révolution, p. 193 et seq.



ably never will ; he knows nothing of their antecedents, their real opinions ; above all, of their characters. What elector, even among the most enlightened, could say in conscience that he was capable of choosing, with due knowledge of the case, forty, or it may be, fifty representatives for Paris. And if the most enlightened man is almost always reduced to the necessity of voting blindly, without knowing what he does, in what condition will the ignorant man be found, that is to say, almost the sum total of the electors? Under this form of election some noisy and active politicians unite together, and declare themselves representatives of a party, make up a list of candidates and present it to the electors. These find themselves then compelled to choose between two lists, or to remain without a representative ; for if they do not vote for a list where the names which they dislike often constitute a half, the candidates of the opposing party will gain the day."

"All is artifice and fiction in this system. The elector is not free and cannot know either those in favor of whom he votes or those against whom he votes. The suffrage called direct is in reality indirect. It is also a suffrage with two degrees, because committees formed at hap-hazard and habitually by intrigue and effrontery are those who prepare the lists, introducing into them whom they please and excluding from them whom they please; and in this way, with no regular agency to do so, discharging the most important electoral functions ; whilst the part acted by the elector is reduced to an act of consent in which he is not free. We have thus an irregular suffrage of two degrees substituted for the regular suffrage defined by law. A system cannot be conceived of more favorable to men without character or conviction, without popularity, fortune, or power, and above all, to intriguers."

"This system has another result worse still, and more grave if possible—it favors the election of men who profess extreme opinions, because in an ignorant population it is always extreme opinions or rather violent temperaments that get the upper hand in each party. We must not deceive

ourselves or be imposed on by words. The vote by departments and with secret ballots lays on us the necessity of the suffrage with two degrees. There is no choice save as to form. We prefer that which is regulated by law, which leaves the elector free and permits him to know what he is doing when he votes, to that which gives the elector up helpless to intrigues charlatanism and the lies of politicians."

The suffrage with two degrees [or, as we call it sometimes, double or indirect] "was well-known in France for ages when the deputies to states-general were appointed. It was engrafted into the constitution of 1791, and by it the constituent assembly and the convention were elected, which also sanctioned it by their legislation. The plan under the constitution above named was the following: the citizens elected by the cantons, meeting in a primary assembly, chose electors one for every hundred registered, two for one hundred and fifty, and so on." The electors chosen by the primary assemblies met on the Sunday following their election to nominate the deputies of the department. (Comp. Courcelle Seneuil, u. s., p. 191.) The constitution of Norway, framed in 1814, contains a similar provision.

The remarks of Courcelle Seneuil are deserving of serious consideration. We may, I think, lay it down (1) that the districts for voting ought to be of small size, in order that all the electors may be able to inform themselves in regard to the character of the candidates. (2) If universal suffrage prevails, with the attendant machinery of party contests, there will be practically an indirect or double election. The voters will be instructed, and in a manner compelled by party ties and their own want of knowledge in regard to the person to be voted for, and the more ignorant they are the more easily will they be led. (3) In this case the indirect election is preferable to that which prevails among us, for, however much the second electors may come under the control of party managers, they will be more intelligent and discerning than the first. (4) If the evils, incident to our system of suffrage owing to its being universal, cannot be, in part at

least, checked by means of personal candidacy, by minority representation, and voting independently of party, the indirect election would be much the less evil of the two; although in a democratic state where the single election prevailed; it would stand little chance of being substituted for the other. The reader will find something further on this subject in the sections on parties in democratic states.\*

### § 222.

In the system of estates, as has appeared, there were three  
Number of cham- or even four distinct bodies, which often sat  
bers. apart. Two chambers became, as we have seen, rather by historical accident than by any political tact, the established usage under the constitution of England, and

\* Mr. J. S. Mill discusses this subject in chap. 9 of his *Considerations on Representative Government*. He makes two points against indirect elections. The first is that the benefits incident to popular power are more certainly lessened by such elections than the dangers. The danger lies in entrusting with a vote for a member of parliament a person that has not intellect and instruction enough to judge who would best fill such a place, and yet could pick out from among his neighbors a person fully able to judge and choose with wisdom. The benefit would lie in the public spirit and political intelligence which would be developed by the necessity of making a direct choice, while an indirect choice has no effect in cultivating either. Moreover, the voter who cannot cast a direct vote, cannot be expected to take much interest in the indirect one. Would he not, then, fail to discharge it? Again, if a person without intelligence is not a sufficient judge of the fitness of a person offered to his choice to be a member of parliament, and really wishes to have some one make the choice for him, "he has only to ask this confidential person whom he had better vote for. In this case the two modes of election coincide in their result, and every advantage of indirect election is obtained under the direct." If, however, he desires to make what would be substantially a direct choice when he can only cast a primary vote, "he has only to choose a well-known partisan of the candidate whom he prefers, or some one who will pledge himself to vote for that candidate." The force of all this may be admitted, and yet we may reply that he who cannot vote directly with intelligence would not take wise counsel whom he should vote for, but would assuredly in most cases take the advice of a plausible demagogue.

the same usage has prevailed in all the colonies founded by the Anglican race, in all the United States, in the American Congress, and the dependencies of the British crown speaking in the English language. It is remarkable that to the Anglican race this has seemed to be a law as fixed as anything in politics, so that where there existed no natural basis for two chambers, or the bicameral system, as Dr. Lieber, we believe, first named it,\* it was thought necessary to establish some artificial one. In England, although historical accident aided the permanent separation of the old estates into two, and gave to the commons an independent position, there were reasons why there should be two houses and no more. There was a marked line between the great land-holding nobility (including bishops and abbots, representing large lands held in mortmain), and the other persons called to the parliaments. And the burgesses representing the towns easily coalesced with the knights of the shires, since they had common interests in maintaining English liberties, and resisting usurpations. In the formation of the constitution for our union, a principle, on which an upper house could be founded, lay in the equality and antecedent separate existence of the states. The plan of the two houses of parliament was so far followed that the house of representatives was invested with the power of originating all money bills, while the senate, unlike the house of lords, confirmed treaties, and appointed certain officers, but somewhat like the lords heard and decided in cases of impeachment. In the colonies and states the houses were constructed on no one consistent plan. Generally the senate or council was smaller; in many cases it continued longer in the exercise of its functions; in some, it was partially recruited in successive years so as never wholly to expire. It is singular what hold traditions from the mother country have had in some of the older states. The houses in some of them heard and granted petitions of divorce *a vinculo matrimonii*; in one or more the senate

\* Civil Liberty, chap. xvii.



heard appeals as a supreme court, after the manner of the house of lords. No person, so far as I know, has thought it worth while that the system of two houses ought to be abolished.

Since the establishment of constitutional governments on the continent of Europe, the practice has varied between one and two chambers. In France, the constitution of the Bourbons of June 4, 1814, contained a provision for two, of which the members of the chamber of peers could be hereditary or for life. They continued through the Orleans dynasty, but the empire went back to one legislative body elected by open vote, with an appointed senate; and at the present time, while we write, the one chamber of the constitution is discussing projects of constitutions amid the predilections of opposing parties, while the most enlightened men of the country are in favor of two.†

The constitution of Norway has a singular device in it for something like two chambers, while in reality there is but one. The Storthing separates into two parts, one containing one-third, the other two-thirds, and laws are made by the vote of the two, confirmed afterwards by that of the whole assembly. Sweden, as we have seen, a few years since reduced her four mediæval estates to two houses, and is more like Great Britain in the composition of the new parliament than any other state of Europe.

### § 223.

If a nation is under free institutions, one at least of the houses must represent the opinion of the nation, its progressive political wisdom and its will.

Composition of the chambers: 1. Of the more popular house.

That this may be done, the territory ought to be divided into districts small enough for the voters to form an independent judgment of the character of the candidates and of their political preferences. In some countries an endeavor

† We are glad to be able to add that a senate is already in existence, the members of which are partly chosen by the people, partly by the chamber.

is made to give an equal voice in the assembly to an equal number of inhabitants. But in order that those whose interests are closely united together may not be separated, sometimes electoral districts are of different sizes, and according to their size return one, two, or three. It seems better to break up a large city into independent districts than to place a list of ten or twenty before each resident voter, for it is impossible that the voters should be well enough acquainted with such a number of candidates to cast an intelligent vote. Again, every district, naturally divided off by interests and industry or by mountains or rivers from the rest, ought to have a representation of its own, even if, in so doing, the weaker parts of a country have somewhat of an advantage in this respect over cities and compact communities. It is not a political right that each voter should have an aliquot part of representative power, say one one-hundredth or one ten-thousandth; but that he should have his interests protected in the legislature of the county or state. We have already seen that all the representatives represent the country, both the totality of interests, and those of each part; the most convenient and equitable plan therefore is that those who have within a certain territory the least power of making themselves felt in the assembly should be most sure of doing this. This principle will apply to rural districts, where the power of the combination of intelligence and of property is smaller than in the towns, and where there are fewer noisy elements. It applies also, as we have seen, to minorities who are likely even to be oppressed. For one, I should not seek for more than a distant approximation between numbers of voters and representation; and as cities have means of influence which the country does not possess, as almost all the disturbing elements arise in city life, as the great interests of commerce, manufactures, banking and other capital there situated are sure to be protected for general reasons, I would give the rural districts something more than their share of legislative power. The cities are to be dreaded in modern times. They take the lead in all commotions, they have less

wisdom and stability, but more energy and political fanaticism than the thinly settled country, where men living apart act less on each other, and think for themselves. It can be shown, I believe, that in great crises of national commotion, when the great interests of a country have been at stake, the country-people when once aroused are the surest, strongest defenders of the land. Such was the case in the war of our revolution and in the great struggle of the present time against secession in this country.

The number of representatives in the lower house cannot be fixed with precision. If they are quite few there is more danger of influence by bribes. If they are quite numerous there are greater dangers. The larger the body collected together within the reach of one voice, the more it comes under the sway of excitement, or it will be apt not to feel a due responsibility because it is divided up; for danger of factions and want of coherence increase with numbers. A house of several thousand representatives would be unmanageable. This was one of the vices of the ancient and mediæval city-states, as we have seen; and under constitutional forms the same evils must prevail to a certain extent. The difficulty of hearing in a large or badly contrived hall would have an effect on laws and debates. An assembly unwieldy through its numbers, where every one is responsible, could hardly perform the office of deliberation. Everything would need to be done by committees and by a few prominent leaders. What is the right number experience must decide. The British house of commons, consisting of more than six hundred, is altogether too large to secure the proper discharge of duty on the part of all. Hence the responsibility of being present and watching business is the less felt, and very often but a handful of members are present.

In what was said (§ 221) of minority representation it appeared that, for its introduction under some of the schemes proposed, voters must look beyond their own district for their candidates. This is a practice hardly known in the United States, and may be said to be undemocratic, for in a democ-

racy the number of persons willing to go into political life is the larger the more it approaches to the absolute character ; and as they are found everywhere and are unknown beyond their own narrow precinct, they will naturally oppose intruders into their province. And yet, why should not the people have a right to choose their representative where they can find the best man, since all represent the whole country ? In the elections to the state legislatures it is to a considerable extent state law, we believe, that the person elected must reside within the limits of the district. Under the constitution of the United States a member of congress must reside in the state from which he comes, but not necessarily in the district which sends him. Thus a man in the city of New York might represent the district around Buffalo. But very seldom has an example of this occurred. It seems to me to be a pity that widely known and highly esteemed men should not be eligible everywhere, as in Great Britain and France, where the principal men are sought after, on account of some connection of their ancestors or their own reputation, by a body of electors they have never seen. The lot of England might have been quite different from what it is, if instead of this usage it had been necessary for a member of the house of commons to be an actual resident of the shire or borough which returned him ; if indeed, so long as the rotten borough system continued, that had been possible. The representatives from small boroughs would have carried little knowledge and no experience into their new sphere, and would have been liable to be browbeaten or bribed. The men on the other hand from abroad, chosen by small places, would feel grateful to them for their choice, and be mindful of their interests. But far beyond this advantage is that of raising up a body of statesmen able to give themselves to politics, tolerably sure of being called into the steady service of their country, and to a great degree in situations which place them above corrupting influences.



## § 224.

The upper house, as we have seen, is called for in some countries by the conditions of society and by historical traditions. Composition of an upper house. A body of landholders, having certain jurisdictional rights, with a territory over which they were also military chiefs, constituted the nucleus of the estate of nobles in the middle ages. England was happy in escaping the extreme disintegration of the feudal kingdoms; it was more in its internal relations a dukedom than a monarchy. The kings of the house of Anjou strove for power and met a stout resistance from nobles and clergy; Magna Carta was won by these estates, yet it took the commons under equal protection. Then the nobles under Henry III. called on the commons to share the government with them. The nobility of England on the whole have been a great help in resisting the excessive power of the sovereign and in securing the liberties of the country.

The house of lords contained at first those who had titles of nobility in their own right, together with bishops and abbots. As the king was the fountain of honor, he could ennoble a person or a family, and give him in personal right or with his successors, the right of membership in this assembly. The wearer of a title, civil or ecclesiastical, might be considered as a representative of an estate with the tenants on it, and of a family, diocese, or convent. In the change of religion under Henry VIII., the abbots disappeared from the house of lords and left no successors. On the other hand, the recruiting of the house, as it has been carried on for a long time, has been singularly wise. The distinguished men of the law, the great generals, to some extent in modern times the great bankers, a few of the literary men and the principal statesmen, have been called up into the house of lords; and thus the tendency to stagnation of intellect and physical degeneracy, which is incident to an old nobility, has been checked, if not more than counterbalanced. Thus, too, the line which was likely to become too marked between the no-

bility and the untitled commons has been made weaker by the elevation of numbers from the commons to the peerage, by the intermarriages between these orders (forbidden in some countries in order to keep the blood pure), and by the fact that the children of noblemen are commoners in the eye of the law. That the house of lords is destined to be perpetual, who would dare to prophesy? With all the influence which it has thrown on the conservative side, obstructing measures sometimes for years before it would yield, it has no such self-subsistence as to be able long to resist the made-up opinion of the country. Relatively, for a long time it has been growing weaker, while the house of commons has been growing stronger.

The principle of the house of lords is one fitted only to a somewhat aristocratic state of society. Would or could such a house, if the democratic feeling which dislikes all hereditary privilege were to gain an ascendancy in England, be able to stand its ground? Would it not be pronounced an absurd thing that a son should succeed to his father's profession when he had no talent for it at all; and does not the constant infusion of fresh blood into the house of lords show the fear that this body would otherwise become too weak for its office of legislation, and sink into contempt? Probably, however, if this house should fall under the blows of a growing democracy, the good sense of Great Britain would try to find a substitute.

The United States were supplied with a happy suggestion how their second chamber should be constituted by the element of equality among the states, which voted as equal powers under the old confederation, and came into the convention for framing the constitution as equals. The smaller states, in fact, had such a fear of being oppressed by the larger that they managed to have a provision inserted in the new constitution, that, while all other articles might be altered in the legal way, the provision, which made the states equal in the senate, should be unchangeable. This is the utmost that could be done. Doubtless at times there have been

men who desired to have a representation in the senate proportional to the population of the states, but hitherto the senate has maintained itself in the confidence of the people as one of the very best parts of the constitution.

Another most important characteristic of the senate is, that, unlike most chambers elected by the people, the members' terms expire on such a plan that one-third is recruited every two years. This gives a certain slowness of movement to the body, and a permanence of life, which stand in antagonism to the other branch of the legislature, and break the force of parties or of novel opinion by an earlier or a more mature opinion. The tenure of a senator's place for six years gives a longer experience to this house ; and their position, as advisers of the president, and as having the power to reject his nominations, invests them with a vast influence, something like that of oligarchy, which was unforeseen at the forming of the constitution.

The other upper or second chambers of modern constitutional governments, so far as they had no historical, but rather an artificial foundation, suggest several inquiries touching the principle on which this part of the legislature should be founded. And first, is it wise or politic, when such a legislative house has not come down from olden time, to introduce it in the shape of an aristocracy. Montesquieu thought that the existence of rich, powerful families, with a historic name, demanded that a special representation should be given to them, or they would become enemies of the established state of things. Mr. Guizot held the same opinion. There is a class, he says, living on the revenues of their lands or personal property; and another, of men living on their labor without land or capital. Each of these essential elements of every society needs a distinct representation, otherwise one would be sacrificed to the other, and things would end in plunder or anarchy.\*

Shall we then say, as M. Laveleye remarks, that the contest

\* Cited by Laveleye, u. s., chap. 30.

between capital and labor is so great, so incapable of being settled, that the representatives of the two must be kept apart? But will this be a cure, will it not rather be a provocative to more bitter strife which will end in an overthrow of the constitution? The position of Mr. Guizot, again, is not a sound one. The chambers are not now and never were elected, the one by men with land and capital, the other by men without land or capital. There is an unbroken row of fellow-men, starting from the poorest day laborer and ending in the richest millionaire. You cannot divide it in twain anywhere, and if you could you would rend society. If an old aristocracy actually exists, and the feelings of the nation, their habits, their history, make them satisfied with it, very well. Compose your upper chamber of such materials, if you are sure that no change will soon come. But in an age like this, when the low are rising in their power and claims, and the high falling in their influence; the foundations of a newly constructed chamber would be tottering, if they rested on aristocracy. The French chambers of peers and the senate crumbled to pieces at the first blow of revolution. Such bodies will be apt to feel that they are stronger than they really are; they will attempt backward movements until a democracy is roused, and then they will abandon the field without a struggle. The supports of an aristocracy must be real and historical; artificial ones will prove of no avail.

The opposition made to two chambers, on the other hand, upon the ground that it is not democratic, deserves no consideration. One argument against it is that of the Abbé Sieyès, that a people cannot have two wills at the same time on the same subject. Hence, the legislative body which represents the people ought to be essentially one. One of the houses, therefore, is a clog on the otherwise free movements of the community. But the question is not in legislation what is actually the will of the people, but what ought to be; what would it be if they were in their representatives' place, invested with their powers of hearing and deciding. The people, by establishing a legislature to which the making of



laws without further reference to the public will is entrusted, have declared that, in their collective capacity, they are not able to make, nor equal to the task of making, the best laws; and they commit this to a smaller body in whom they confide. Still further, it is a harder problem often to find out what, in strictness of speech, is the will of the people, than it is to find out what laws and measures are best for the common welfare. The opinion and will of every modern community changes with rapidity, so that a minority becomes a majority, and a majority would adopt different measures than it did when it elected the existing legislature ; and thus we might say with perfect truth that two houses, elected or renewed at different times, would each express the current opinion at the time of its election, and on the whole, by their joint action, be better exponents of the sober judgments of the community than one alone ever could be.

#### § 225.

Taking this view of the changes of opinion and policy in a constitutional government, we must deny that one chamber ought to represent the conservative, and one the progressive element in the constitution or in opinion. In matter of fact this is the case under the English constitution, and thus a theory has arisen that some such balance of powers must be found in all constitutions. Both houses ought to represent public wisdom and intelligence as far as possible ; but if they were chosen at the same time and continued for the same time in office, they would be of less use ; indeed, they would be under the temptation of differing, in order that it might be seen that they held independent opinions, or possessed superior ability. The conservative and progressive tendencies ought not to belong to a part of the political machine, but both chambers should be conservative, both progressive ; although, if elected at different times, they would have these qualities for the time being in different proportions.

The true view of the use of two houses is *first*, that by this

means hasty legislation is prevented. Each house, knowing that the propositions which originate in it will be carefully scrutinized by the other, will be rendered more careful, more deliberate, more awake to objections; even its own reputation is at stake before the public; one house cannot be expected to have a very tender regard for the good name of the other, but will be only too ready to find fault with its conclusions. Mr. Mill attaches little weight to this argument—for, says he, “it must be a very ill-constituted representative assembly, in which the established forms of business do not require many more than two deliberations.” It is true, that if drafting acts and passing them with the forms prescribed by parliamentary law were all that a second house were needed for, it would not seem to be of much use; although with all these forms, with the three readings and the debates, with the reports of committees on the different branches of business, legislation often goes on in the most careless, the clumsiest manner; many members of legislative assemblies, it is believed, have not examined the projects of bills on which they are called to vote, many are unfaithful in giving their attention to business aside from their political duties. There are also excitements in one house which do not reach the other; every public body is influenced by the temper and bias of particular members, and a house large enough to excite the debaters into passion will be more liable to these flaws than one the composition of which does not disturb the calm that should belong to a deliberative assembly. I believe that the confidence given to the “bicameral” system in the United States rests very much on this feeling, that two bodies somewhat differently composed will originate more careful, better digested legislation than could be expected from one.

*Another* advantage of two chambers is that the evil effect is thereby prevented which the consciousness of having only themselves to consult, produces on the minds of any holders of power. This consideration is urged by Mr. Mill, and I give it nearly in his language. “It is important,” says he,

“that no set of persons should be able, even temporarily, to make their *sic volo* prevail, without asking any one else for his consent. A majority . . . composed of the same persons habitually acting together . . . easily becomes despotic and overweening, if released from the necessity of considering whether its acts will be concurred in by another constituted authority.” The remark has often been made, I believe, in this country, that a legislature where one political party is very weak will often show a much more intolerant and audacious spirit, and give rise to worse legislation than where there is a considerable and an able minority to watch them. They become an oligarchy, if not opposed. It would be something the same, if a legislative chamber had no other to control it. The chance, too, of corruption is less.

Mr. Mill remarks further, that two chambers foster “conciliation, a readiness to compromise, a willingness to concede something to opponents, and to shape measures so as to be as little offensive as possible to persons of opposite views; and of this salutary habit, the mutual ‘give and take’ (as it has been called) between two houses is a perpetual school—useful as such even now, and its utility would probably be even more felt in a more democratic constitution of the legislature.” This remark has some justice in it, but needs, we think, to be qualified. A legislature, with an aristocratic house of lords or chamber of peers, will resort to continual compromises in order to make any headway, for there will always be, or seem to be, an opposition of interests between the constituencies of the two. Hence, there must be perpetual concessions; or much legislation once begun must be abandoned. In such a case the aristocratic chamber—if the weaker of the two, as it naturally will be—must in the end yield. The remarkable history of the reform bills in 1832 reads a lesson which was repeated by the abolition of the corn-laws in 1846. In the first case after long resistance, the house of lords yielded so far that a number of foes of the bill announced their intention of staying away from the final vote, rather than to have a majority produced by the exercise of

the dangerous prerogative of creating a new batch of peers. Such compromises often repeated would ruin any house which could obstruct legislation without defeating it; the house would fall into contempt. But, in a democratic country like ours, if the two houses were of opposite politics, neither would yield except so far as to make compromises in small particulars. And, indeed, Mr. Mill remarks that "in a really democratic state of society, the house of lords would be of no value as a moderator of democracy;" that (the really moderative power) "in a really democratic constitution, must act in and through the democratic house."

Mr. Mill regards the full representation of minorities in a single house as a more effective centre of resistance to dangerous legislation than any which a second chamber could afford, which would be open to the imputation of class interests adverse to the majority. If, however, a wisely conservative body were felt to be necessary, the office of which would be to moderate democratic ascendancy, the best form in which it could appear would be, he thinks, one following somewhat the pattern of the Roman senate. It should be a chamber of statesmen, as contrasted to the people's chamber—"a council composed of all living public men who have passed through any important political office or employment." Such a body would not only moderate, but also impel. It should be confined to men who have been in a legal, political, military or naval employment. But scientific and literary eminence are too indefinite and disputable "for supplying such a senate with members. . . . If the writings by which reputation has been gained are unconnected with politics, they are no evidence of the special qualities required, while, if political, they would allow successive ministries to deluge the house with party tools." To which might be added that literary men are seldom successful in politics. They are either impractical or conceited, or too fine for the coarse blows of public assemblies, and often unable to stand up for their views in debate.

It is perhaps superfluous to criticise a project which is



never likely to go beyond the mind of its author, but we may add in brief that the Roman senate was not a legislative, but an administrative body ; that it represented a wealthy aristocracy which kept offices admitting into the senate chiefly in the hands of the optimates ; that it managed affairs so selfishly as to create an opposition headed by some of its members which finally crushed it ; and that it is the best justification of the empire that the senate was unequal to its work. No such body could last long in a state verging towards a government either of the imperial or ochlocratic kind. It would indeed have some excellent characteristics, as including "all the talents" of a political kind in a country, but the members in general would be old with the conservatism of fixed ideas, which is the worst possible conservatism. Who would expect legislation to be made wiser by old gouty admirals and generals accustomed to be obeyed, or by old judges who are of all men most attached to the existing system of legislation.

If one of the chambers were small and had the confidence of the people, its influence might be cemented by giving to it certain special powers of a somewhat administrative character. Thus the treaty-making power, which in monarchies has belonged to the king, and which needs secrecy for its success in negotiations, must in all forms fall more especially to the executive ; and yet treaties, being wide-sweeping in their effects on law and on constitution, ought not to be placed beyond the reach of the legislature. Thus a commercial treaty may establish such relations between two countries, as materially to influence taxation and restrict the power of a legislature. In England the control of parliament over treaties is only indirect. Public opinion may deter a cabinet from making an obnoxious treaty, or the house of commons may refuse grants of money necessary to carry one into effect. In the United States the senate has the power of sanctioning treaties, and the house of representatives has no other control except that of refusing to vote the money which the treaty calls for. When there is no such call, a treaty goes on

to its fulfilment at once ; when there is such a call, the house is morally bound to vote the money, because the treaty is valid and their assent is only a form. Such a function as the treaty-making one belongs to a branch of the legislature possessing the requisite qualifications, and is not in theory, nor ought it to be in practice, an exclusively executive act. So such a branch might have a voice in appointments ; and in a confederation, perhaps, in adjusting some of those questions which can arise between the government of the union and that of a particular state. On the other hand, the power of originating money, bills, and some others, can best be lodged, as in England, the United States, and in other modern constitutional governments, in the more popular branch.

It was natural in England that the great mass of tax-payers should by their representatives have the leading voice in determining the amount and character of the tax. In the United States not only the precedent of the English constitution led in the same direction, but the just feeling that the people's representatives rather than those of the states, ought to originate measures that must press on all. Yet, as there is no such marked contrast between the senate and the house of representatives as there is between the lords and the commons, our constitution allows the senate to *amend* money bills.

### § 226.

In all modern constitutions which are reduced to writing the functions of the legislature, and of the chambers, if there are two, are minutely described. This seems to be important, because the executive and legislature are in danger of invading each other's field, and the executive, being always active, can use its force effectively when the other is at rest. In general the constitutions of the German powers are so contrived that executive action is as little hampered as possible. Great Britain differs in its constitution from all other free states in having no written constitution, and especially in having no limits placed to the power of parliament. The parliament of England

Limitation on legislative power.

has deposed one or two kings, has declared another to have abdicated and left the throne vacant, has changed the succession so as to exclude a Catholic who might be the next heir to the crown ; it has, in the form of a convention, restored the monarchy and a dynasty—not to speak of such acts as were done by the long parliament in subversion of the existing framework of government. The omnipotence of the legislature in Great Britain is not feared, because any essential change of policy or violence done to public opinion would arouse such a storm of public feeling that a dissolution would follow, and a new election, perhaps a new cabinet, be the result. This is the great excellence of the English constitution, that it rests on precedent, that it bends slowly and against opposition to the introduction of new measures, and thus has for its foundation the will of the community which is manifested directly and violently only at great crises. It admits of the rule that the nation is sovereign and not the government, but only applies it once or twice in a century. No other people could do the same, for no other people has had such a political training. Nor can we believe that Great Britain can always retain the same good habits, and have the same happy balance of powers and moderation in its governing classes. The maxim hitherto has been :

“ So let the change which comes be free  
To ingroove itself in that which flies,  
And work, a joint of state that plies  
Its office, moved with sympathy.”

But this is, as the poet continues,

“ A saying hard to shape in act ;  
For all the past of time reveals  
A bridal dawn of thunder-peals  
Whenever thought hath wedded fact.”

Hitherto the prevailing practical character of the nation has prevented “ thought ” from taking an abstract and a revolutionary turn. Can this be so in time to come ? Can gradual encroachments of democracy, connected with changes in

industry and commerce, and with public disasters, fail in the future to subvert or essentially modify the constitution? Then it will be necessary to give up trust in past habits and, probably, to frame a written constitution, which, rather than steady habits and practical wisdom, shall be the mainspring in sustaining the interests of the nation for the time to come.

Where a constitution in a written form exists, it limits the action of the several departments, declares what they can do and what they cannot, and endeavors to secure a harmony and distinct action of them all. One would think that the minute provisions of many of our modern constitutions were sufficient for all possible cases of difficulty that could well arise.

And yet in the United States there have been not a few complaints against the misconduct of legislatures, and not a few charges of corruption.\* Several of the states, especially Illinois, Pennsylvania, and Missouri, in new or revised constitutions, have attempted to limit their powers in several ways. One of the most important is that no special laws shall be passed for incorporations, but that a general law shall cover all cases. It is thought that this will prevent a large part of the suspicion and bad repute that has of late years fastened on these bodies, and will diminish what is vulgarly called the lobby or gathering of agents of companies and others, who have business before legislatures, and are supposed to use unlawful influences with them. Other powers that need to be taken away from such bodies are the granting of pardons and of divorces, the election of judges for the higher courts, the furnishing of aid to companies for benevolent purposes, or to those engaged in transportation; but, above all, the limitation of the power to borrow money on the credit of the state, and to lay a tax beyond a certain

\* Burke (*Thoughts on the causes of present discontents*, i., 389, Bohn's ed.), speaking of the want of "a decent attention to public interest in the representatives," sees no other way of preserving such attention but the "interposition of the people itself." This, however, he regards as an extreme remedy only. To limit the legislature constitutionally, is hardly consistent with the nature and history of the British parliament.



percentage, unless in certain great and definite exigencies. Some of these restrictions already appear in the constitutions of a number of the states; thus divorces are chiefly confined to the jurisdiction of courts of justice, which were formerly, after the example of the English parliament, granted by the legislature.

Other restrictions that deserve mention relate to the time of holding office, the length of the sessions, the power of the executive to dissolve the chambers, and the veto.

1. No general rule can be given except that a very short term of legislative service, such as prevails in many of the states of our union, is destructive of good legislation, and calls forth unnecessary political excitements. If the reforms introduced into several of the newest constitutions shall be found to abridge the length of sessions, it will be quite possible to have but one in two years, and at all events the term of two years for holding the office will be found to be better than that of one. But the plan of periodical renewal which we shall presently speak of is probably better still.

2. In regard to the length of sessions a plan has been hit upon in some of the United States, which is worthy of mention: it is to give the legislators either an allowance of so much for the session, in which case they would have a motive to despatch business, or to pay them so much per diem for a certain number of days, after which they must pay their own expenses, or, finally, to provide that the session shall close at a certain date. Whenever the useless and even hurtful power of special legislation is taken away, it will be easy to close sessions within a reasonable period.

3. The power to dissolve the chambers or estates was naturally lodged in the mediæval suzerain, for he called them together for his own purposes. The uses of the power in the hands of the modern sovereign in England we have seen; in fact, it has appeared to be the hinge on which everything turned. But ought the same power to be lodged in the sovereign's hands in other constitutional kingdoms, as in that of the chief officer in a republic. Apart from the inconveni-

ences which the exercise of such a prerogative would involve, it does not seem to be consistent with the modern system of free election by the people. If the legislature expresses the will and judgment of the community, why should it be dissolved; if it does not, either the executive would not wish to dissolve it, or it will soon terminate peaceably of itself. To give the executive chief the right to do something short of this, to say to the lawmakers "you have been here long enough, you are dissolved," would be felt, at least in a republican state, to be veritable tyranny.

4. The veto. In Great Britain, where the king parted with a certain portion of his power, and divided the legislative function with the parliament; it was to be expected that he should reserve his power of accepting or rejecting the bills passed by the houses; and it could be presumed that he ratified or negatived according to the counsel of his constitutional advisers. But the veto—which was *absolute*—has long been superseded by a new procedure of the system of ministerial government. Whenever now the house of commons is in direct opposition to the ministry on an important question involving want of confidence in them or in the premier, it is the usage to dissolve parliament and try a new election. If the election turns out to be in favor of the ministry, the obnoxious law or measure may now again be brought up. Otherwise the ministry resigns; a new cabinet is appointed which carries the bill through, and the sovereign adds his sanction. In other words, the king will not oppose the voice of the nation expressed through their representatives. That is a part of the constitution, on the observance of which the kingly office depends. During the reign of George III. it was understood that he regarded it as a violation of his coronation-oath to remove the political disabilities of the Catholics, and the ministers, who would have favored some measure looking that way, forbore to press any on account of the king's scruples; but probably no sovereign hereafter will exercise this old prerogative except in a most extreme case.

In the colonies, where the governor was the king's repre-

sentative, the same right was claimed and exercised; in the colonies under royal charters the particular charter might or might not concede the privilege to the governor. Our general constitution contains the right of veto in another form—in that of overcoming a majority less than two-thirds of both houses. This measure of the value of the president's disapproval was chosen after debate in preference to that of three-fourths, which was also before the convention. It has also, with less reason been introduced into the constitutions of a number of states, while a few have put into the chief magistrates' hands only the *right of sending back* a bill with his objections, which, if the temper of the houses remains the same, is of no force. A *third* form of the veto appears in the constitution of Norway, where the immediate effect of it is to suspend action during the session of the storting, but if the two next storthings agree on the same measure, it becomes a law, the king's successive vetos notwithstanding. Thus we have the *absolute*, the *qualified*, and the *suspensive* veto. The *liberum veto* of the kingdom of Poland had no relation to the right of the chief magistrate, but denoted the power of one of the nobility to interfere with an election of a king. The right in some estates, as in those of the United Provinces, to prevent the states-general from declaring war and doing certain other things without the unanimous consent of the provincial estates, was simply an example of a confederation in which the members gave the smallest amount of power to the governing body.

The French constitutions of 1793, 1795, and 1848 gave no power of veto, if we are not in error, to the principal executive, but under both empires and the restored monarchy this power was again put into the hands of the king or emperor; and the tendency of democratic opinion is to make the chief of the state little more than a president of a council, with the necessary executive functions. It seems to some like a mingling of departments to give the right to an executive officer of interfering with the proper business of law-makers. But this is a deduction from theory rather than

from experience. There is no absolute separation of functions. Laws are so important in their bearings on the interests of a country, so apt to be drawn up hastily or in the spirit of party, or to contravene the provisions of the constitution; that there is need of some person outside of the legislative circle to examine them and in an extreme case to prevent their passage. Take the instance of a law which opposes the true meaning of the constitution. The chief magistrate is advised by his legal counsellors that this is unconstitutional, and obstructs its passage. How much inconvenience and possibly oppression of the individual, how much expense in arguing the constitutional question is prevented by a declaration of the chief magistrate that he cannot consent to the law. It would be unbecoming and might lead to bargaining between the departments, if he expressed his opinion beforehand or during a debate; he has no right to a fully formed opinion until all the light thrown on the proposition by the two houses is within his reach. But as he is bound to administer the laws under the constitution, he must form for himself, with the proper assistance, an interpretation of the constitution by which he must abide. This seems to require him to interpose his *veto* in all cases where he has a serious doubt, and to do this beforehand is better than to accept a law and have its constitutionality tried afterwards. Is then a chief magistrate armed with this power one of the sources of legislation on a par with legislative chambers? Certainly not to the full extent of such a power, otherwise he should have the right of proposing laws or measures through his cabinet or personally, instead merely of giving advice to the legislature on public affairs. He is rather a check on legislation, where the opinion in that department does not approach to unanimity. Thus the veto of our president is a part of that system of checks of which there are so many in the Anglican political system—a system which reminds one of an old house with buttresses here and extensions there, that has served the inhabitants well for centuries, but which needs repairs from time to time in order to last through coming centuries.



I must, however, express my opinion that the veto power in a democratic republic like ours is liable to be abused. The president ought to feel, when he takes his office, that he was elected by a party to be the president of all, just as a representative elected by a party is elected to be the representative of all, whether they all had a vote or not, and whether they voted for him or not. But there is great danger that he will not feel so, or rather almost a certainty that he will not. Especially when in the changes of party he holds office while the party which chose him has become a minority, he will be apt to use this formidable weapon of the veto to protect laws or measures of his partisans from being abrogated, and to prevent those of the reigning party from passing. If the party character of the government should grow more and more pronounced, it might become a question whether the president should not be stripped of the veto, or, at least, whether the suspensive form of it might not be substituted for the present one, so that two successive congresses—not two sessions—could pass a law over the president's head. As for the value of the power, looked at in the history of our politics, it must be admitted to have been exercised in many instances with great advantage to the country.

#### § 227.

If there is in a state a class of independent landholders who can afford to serve the state without pay for their services, they would naturally make the most disinterested and the ablest legislators. And if men fitted for political life were needed who could not thus serve the state without a fee, their friends might help them forward. The danger in this plan would be that an aristocratic class and their interests could too exclusively control legislative proceedings. In a country like the United States gratuitous services of this kind would be at present impossible. In Great Britain, no salaries are paid; the same is true of the present German empire and the late French empire. If a salary is given to members of a legislature, it must be suffi-

Compensation to  
members of the le-  
gislation.

cient for a respectable support. If it were too small to supply rational wants, many of the best men in the land would be obliged to refuse the position, and others might accept it with corrupt ends in view.

Mr. Mill remarks (Repres. govt.) that "if, as in some of the [British] colonies, there are scarcely any fit persons who can afford to attend to an unpaid occupation, the payment should be an indemnity for loss of time or money, and not a salary." And he adds that if an adequate remuneration were attached to this post, the occupation of a member of parliament would become an occupation in itself, carried on, like other professions, with a view chiefly to its pecuniary returns—and would become an object of desire to adventurers of a low class, of such as would be incessantly bidding to attract or retain the suffrages of electors by promising all things honest or dishonest, possible or impossible; and rivaling each other in pandering to the meanest feelings and most ignorant prejudices of the vulgarest part of the crowd. And he cites Prof. Lorimer of Edinburgh as remarking that, "by creating a pecuniary inducement to persons of the lowest class to devote themselves to public affairs, the calling of the demagogue would be formally inaugurated."

There is truth in these statements, but they are somewhat extreme. The growth of demagogues is not principally due in this country to salaries, nor did the want of salaries at Athens keep down such men as Cleon and Hyperbolus. The salaries in the United States are too small to breed demagogues upon, of themselves; the motives for places attained by election are complex, and they fasten especially on the love of distinction. If there were no compensation, many useful men would be unable to serve, and it is quite doubtful whether the men of the meaner sort would be prevented from seeking office. Every country must be judged in these respects according to its own social and political conditions.

## § 228.

In some countries, as in England, and I believe, in France also, as well as in the southern and western states of this Union, men have offered themselves to their countrymen as candidates for the legislature. In the northern United States, for the most part this has been thought indecorous, an obtrusion of one's self upon the public; and instead of it the practice is that nominations are made by agents of parties meeting in convention or caucus. This is the most objectionable way altogether of getting into a political place, and involves the government of parties by bad men, and through them of selecting men of party, available men, unobjectionable men, or weak men for legislators. I propose to consider this mode of selecting candidates again, when I come to the subject of party government.\*

## § 229.

In order that legislative chambers should be able to discharge their duties at all times, in some countries they have been exempted from arrest in going to the place of their duties and during the continuance of the sessions. This seems to be reasonable, for it is quite conceivable that a member of a deliberative assembly might otherwise be deprived of his vote by political enemies. Crimes of violence, however, breaches of the peace on the part of such a one, ought not to pass unnoticed, nor the trial for them be put off.

Within the chamber of legislation itself the members are generally, and with reason, safe from all outward jurisdiction. As for rules of order, and rules relating to the introduction of business, the reference of it to committees, the reports and debate upon it, the repeated readings, and the like—all this,

\* Aristotle, however, was offended by persons offering themselves as candidates for office. He says of the Spartan *gerusia* that one cannot approve of a citizen's personal solicitations for office which took place there. (Pol., ii., 6, § 18.)

having been elaborated during the long experience of the Anglican race, has passed over in part to other nations which have come more lately into the possession of "parliamentary government," and is of vast importance for securing sober, quiet, and wise legislation. Indeed, but for well digested rules, enforced by a speaker or presiding officer, in whose hands a degree of arbitrary power is necessarily lodged, it is difficult to see how free governments could well sustain themselves in times of great political violence. An executive would have a pretext to disperse the members of a tumultuary assembly, and the institutions of a country would be in danger of falling into contempt. When members of such a body forget themselves and give way to outbursts of passion, they can be reprimanded by the chairman, and it is often in the power of a house to put a member under arrest for an offence, as well as to expel him for crime. This is not primarily punishment, but a means of preserving the order, dignity and purity of the department. Such a house has also power over persons not members who are allowed to be present. Unless the constitution prohibits, the proceedings may be secret, and an audience be commanded to retire, or particular persons may be arrested by the proper officer. Debates ought to be in all ordinary circumstances open, and full reports of proceedings to be permitted. In some countries, again, persons whose testimony is held to be important—for instance, on public accounts or when charges of corruption are brought against members—may be summoned to appear before the house, and although in our constitution it is not expressly said that congress shall have such a power, this seems to be implied in the very nature and necessities of the legislative function. Refusal to appear is contempt, and exposes to arrest by the officers of the legislative body and to imprisonment. In the exercise of these powers the legislative department verges on the judicial.

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## § 230.

*The Judicial Department.*

The judge's proper office is retrospective and looks at a particular fact or omission in the past, although a judge may also interpose to prevent an apprehended injury. We have seen already how it differs from the law-making function, which properly relates to decisions binding in the future, and from the executive which applies those laws in particular cases. In the case of the individual man, to lay down rules of conduct for himself answers to the *legislative* function of society; to act on those rules or carry them out in the conduct of life is his *executive* power; to sit in judgment on his own conduct and his rules is his *judicial* faculty. If society were at a standstill and no new relations were to arise, there would be no need of a law-making power, but rules or customs would endure from age to age. In the simpler forms of society there is comparatively little need of what we call an executive; but then, as much as in more advanced stages of political life, men will steal, commit acts of violence, injure their fellows in property and in other rights. The office of a judge, then, is always necessary, in the infancy and in the manhood of the world; it was a primeval institution before any of the other institutions of tribes or cities were much developed; it will continue to be equally important until men become perfectly just. If such a time should dawn on the world the criminal side of judicial business would cease, and the civil greatly diminish or give way arbitration.

At first, it is probable that the functions of the judge, military chieftain, and priest were united in one and the same person.\* In patriarchal life the head of the clan, or some one acting under him, decided cases submitted to him between man and man, not according to strict law, which did not exist,

\* Aristot., Pol., iii., 9, §§ 7, 8.

but according to equity ; usage and prescription determined in cases of property ; crimes of violence were revenged by the clan or smaller community, and homicide especially was punished by the next of kin. In some communities for private warfare were substituted pecuniary satisfactions, or an estimate of damages which was carried out in the codes of laws expressing this state of society with most surprising minuteness. The decisions in the *gaus*, and hundreds of the Germanic races, were, according to Tacitus, made by *principes* and a body of freemen. The underlying idea in this system seems to have been that the meeting of the community under its head was entrusted with judicial proceedings. The same idea is perceived in the democratic Grecian city-states, where the archons and other officers capable of presiding in courts prepared a case, and a large committee of the people found the verdict. Sometimes the *ecclesia*, or (as at Rome) the people in the *comitia*, decided in certain graver matters ; but the courts there at length consisted of a few judges, or a *judex* furnished by the *prætor*, under whose superintendence the preparatory work was done. The system, according to which the whole people was considered as invested with the judicial power, fell away in the Frank kingdom when the people, being worried by the courts as chief judges of counties, or by the *centenarii* as their deputies, with frequent summons to attend their *placita*, lost the old spirit of discharging their public duties. At one time a set of men called *rachimburgi* were appointed to give advice to the people assembled in the *placita*, in regard to the cases brought before them. In their places, Charlemagne appointed another set of men, called *scabinci* or *scabini*, for whom we refer our readers to § 237.

In England, after the Norman conquest, and at first in the reign of Henry II., a system of jury trials begins to be established. We meet with *eideshelfer* or *conjuratores* as early as Cent. vi. on the continent,\* whose business it was to testify

\* Comp. Gförer, Deutsch. Völkerr., i., chap. 10.

to the character of the accused person, and it is supposed by some that juries in our sense of the word began, when these persons, neighbors of the person on trial and present in the court, were found convenient to judge on the facts of the case. Other explanations are given by others which we are obliged to pass over. When the jury-system was established a new element was introduced, somewhat similar to that found in the early city-states in Greece, the juries being a kind of committee of the people to aid the king's judge. But the position of the jury in relation to the judge was not so independent at first as it became afterwards.

The judges in England were the king's officers, although there and in Scotland baronial jurisdiction had existed as it did on the continent, and only disappeared by degrees. Of the various courts I can say nothing, nor of the circuits of the judges in the counties. The king's courts supplanted the courts of the barons, being appealed to from them. But the king's judges were dependent on him, and being removable at pleasure, were often not to be trusted, when he was interested or sought to influence them. At length, by the act of settlement (1701), the judges were by law to hold their office *quamdiu se bene gesserint*, and at the accession of George III. it was provided that a king's death should not put an end to their office. Many other improvements have been made in more modern times, among which that which a few years since brought in cheap justice, without lawyers and without juries unless the parties wished, by means of county courts, for the settlement of small civil cases, deserves especial mention.

The judiciary system in a country comprises all the judges in the various courts from the police and municipal justices up to the high courts of appeal, including those of equity, if that is committed to a distinct body of judges,—together with the juries where they are in use, the officers employing in summoning, arresting, and executing sentences, a portion of the police, *i. e.*, the detective force, in a certain sense, also the legal profession, and any bodies vested with judicial powers

aside from the ordinary courts. In regard to the judiciary in general, especially the regular courts, we remark,

1. That they are in no proper sense the representatives of the chief magistrates or of the people. When the people judged in the city-states, they did so because they feared to set the aristocracy or any irresponsible judges over them. But the system was bad. The bodies of *dikasts* at Athens brought into the courts all the prejudices and political feelings of the ecclesia. We find orators appealing to their political feelings, and undertaking public suits in order to put down their rivals.\* The true idea would have been that the community was sovereign, but was bound to appoint judges who could have the impartiality and knowledge which they (the community) did not possess. So the kings who acquired this right were bound to appoint men who should, in disregard of a royal wish or command, judge fairly and righteously. But kings generally appointed judges to carry out their will which was just defeating the end for which the office ought to exist. Judges are in no sense representatives of the people or the king, or of any will whatever, except so far as they take a place which the people or the king filled before. In a higher sense, they are not representatives of the community nor of its chief magistrates, but of justice and of God.

2. Judges differ from other officers of state in that they have a part to perform which is almost exclusively moral. If the fact is in question, they are to search out what it is without bias and with an earnest desire to know the truth. If the law is in question, they cannot swerve a hair's breadth

\* For instance, in Demosth. c. Aphob., ii., at the end, the boy-pleader says that, if he gains his case he will be willing to discharge his *liturgie* (or public burdens), as being grateful to the judges for restoring to him his estate; but, if they should make his adversary, Aphobus, master of the estate, *he* would do no such thing. "For do not think that he will be willing to perform public services for you on property which he denies ever having received; he will hide it rather, in order that it may appear that he was justly absolved from my charges against him."



from the law. If equity is in question, they must make no rules of equity to suit the immediate case, but must inquire what is the highest justice.

3. They must then be removed as far as possible from all biases and warping influences, whether proceeding from a court or government, a people or public opinion, or from the base approaches of suitors or the improper influences of advocates. They must have the spirit of the old prophet, who, when a king's messenger said to him "behold now the words of the prophets declare good unto the king with one mouth; let thy word, I pray thee, be like the word of one of them and speak that which is good," replied, "as the Lord liveth, what the Lord saith unto me, that will I speak." They are in fact more immediately servants of God than any other men who manage the affairs of a country, because expediency, departure from law or from constitution, is for them in no circumstances a thing to be conceived of. They are not called to promote the interests of the country directly, but to decide in particular cases that come before them what is law, or what is fact.

4. Having thus the general principles of law and their application to particular cases in their hands, they are the great defenders of established order against the legislative and the executive departments of society, and also against the insurrectionary forces of the community, so far as individual men or small bands of them rise in rebellion against law. Their relation to the law-making and the law-executing powers is peculiarly delicate and important, whether there be a written constitution or one of traditions and of laws held to be especially sacred. For if a legislature, which is subject to lawless gusts of public feeling, shall pass an unconstitutional law, how is the constitution to be preserved as a living and sacred instrument? There is no entire stability or continuity of jural existence in a nation, where there is no power outside of the legislature to decide whether it has overstepped its bounds. Shall the *executive* be invested with such a power? This power, for the moment of decision whether a law ought

to pass, is given in many or most constitutional governments to the chief executive. But he with his constitutional advisers may be under the same misimpressions which governed the legislature, and there is moreover a presumption, when a law made by a legislature is brought before the chief magistrate that it is in accordance with the constitution. This, then, is not enough, not to speak of the evils which might arise from frequent vetoes, that is from frequent conflicts of independent functions of the government. There is need that some other power, not strictly political, removed from the struggles of the present, having no ends of its own to answer in the future, scarcely capable of being jealous of other authorities, should have the function of deciding what is the meaning and application of laws, and whether there is any positive conflict between a new one and a received one, or between a new one and a constitution. Thus, suppose a law passed which virtually sets aside the *habeas corpus* act in certain particular cases. The law may well be dictated by temporary political feelings. Shall the act be understood to be modified, or even suspended, though no mention has been made of such suspension, and no intention to do this is apparent? This, in the United States, might conflict with the constitution which includes this act; in England, where there is no formal constitution, and where a parliament could overthrow the act, as it could abrogate any other law, the question would arise whether the parliament intended that the new or the old law was to be binding. In either country no body of men is fitted to decide such questions except the judges. A private person is obnoxious to the new law, and pleads the old one in his defense. If the old one was of prime authority,—a bulwark of individual protection against an executive and subservient courts, and was not formally suspended or abrogated,—the presumption is that the new law, less general and applicable to particular cases, was not intended to be an exception, but was ignorantly and carelessly passed. Hence the decision of the court against the new law, while it would not imply that sovereign, lords and com-

mons might not in one session abolish the habeas corpus, just as they passed it, would confirm that most important instrument, until the people could have a breathing spell. Meanwhile the old law would stand, and a case that was before court would be settled on the principle of the old statute. It is the same under a written constitution such as ours, only that the law would be pronounced invalid because it conflicted with the express words of the constitution.

Suppose, on the other hand, a very obnoxious law to be passed in a constitutional country, which the judges are obliged to regard as strictly in accordance with the ground-law. They are here sworn defenders of law, even of law which opposes the sound sense of a community. Only the power that made can alter ; and the censures of the community on their representatives will be followed by a change of legislation. Thus a judiciary, while it is the protection of right under law, has not any proper law-making power ; it is the instrument for keeping up the order of things ; change must come from another quarter. Again, unless in constitutional States there is a power able to watch over the constitution, and prevent invasions of it, especially by the executive, it must become a sham, of force against the people but unable to put a check on the arbitrary acts of the public officers. The highest courts can exercise this guardianship of the constitution better than any other board of control that can be devised. The questions that concern constitutional law come before the judges of the highest courts in the same unpretending way in which every other question comes,—on appeal for final decision. A person is required by an officer of the government to do a certain act, and refuses compliance on the ground that it is unconstitutional. The same process is used which would be used if the officer demanded something simply illegal. If the decision of an inferior court is sustained, this is an end of the law. The legislature, if it endeavored by new measures of its own to uphold the law, could do this only by the help of the executive. If the officers of the executive after such a decision endeavor to enforce

the law, the enforcing officer would be exposed to the prosecution of the injured party before the courts. Thus a power in the state which is without physical might watches over the instrument in which the principles of stability are incorporated, and watches effectually, until government and people desire to have a change in the constitution.

5. The judiciary has no law-making power, and yet in some countries by their decisions in new cases, they can apply old principles to the changing relations of society ; and, in fact, can often render new law unnecessary. If man had an absolutely fixed physical system there would be little progress in the science of medicine. So, if society met with no changes, if all relations were as fixed as they might be in the patriarchal life of a tribe removed from all other tribes, there would be no need of new legislation. But the thousand changes arising from intercourse with foreigners, inventions, different distribution of property, new ways of conducting business, and the like, call up questions to which the existing laws do not apply. What is now to be done ? If the law-making power undertakes to reach the new conditions of things by law, this must be a groping process, the law must be made before the case is understood, and will, it is probable, work badly. It must be tinkered over and over until it meets the new circumstances and difficulties—not to say that in this way the first evils or disputes arising out of the new state of things must be unprovided for. But what law cannot do, the courts can do from the very first. For as rights are fixed in their general form, there will generally be some time-ripened principle applicable to the new emergency of justice. A precedent can be found, approving itself to the reason of judges and of lawyers, by which the domain of existing law is extended so as to protect these new growths that demand protection. In this way a stability is given to the new conditions of human life and work. Then if, after trial of the precedent established by the courts, new legislation, additional or adverse, is needed, it can come in so much the more safely and wisely. Roman law could never have grown into



the system which it at length became, unless the prætors had worked over the materials of the existing law by their edicts. International private law, or the "conflict of laws" is, to a great degree, the creation of the courts of Holland and some other European states, with the view of removing the impediments in the way of private business by the application of principles already acknowledged. And although this branch of law is imperfect and not wholly settled, it may be said that the peaceful commerce of nations could not without it have reached the great proportions of modern international trade. Nor can any one read the history of judicial precedents, as evolved in English courts, without being struck with the great value of this function of courts as an accompaniment, as a substitute, even, for legislation.

6. Another exercise of judicial wisdom consists in equitable jurisdiction, in putting into the place of strict literal law something higher and better. Here the spirit of law, its intention and aim, is preserved; while in a particular case or class of cases its operation gives way to considerations, not of expediency but of extra legal right. Equitable exceptions are like pardons in that they set aside the positive letter; but yet they confirm the rule on which it is founded. *Summum jus est summa injuria*. It is evident that such a border land as equity implies along the boundaries of law ought not to be left within the control of an executive; it must belong to a body accustomed to travel over the whole territory of jurisprudence, and familiar both with its rigid principles and its beneficent spirit. Whether equity and law ought to be so far separated as to be committed in practice to a different set of judges is a question which has been disputed, and on which the jurists of different lands do not agree. The best opinion seems to be that all courts ought to have jurisdiction in equity cases, since there will otherwise be too pronounced a separation between the two kinds of judges.\*

\* In the United States the tendency for a considerable time has been not to separate the two by assigning them to two classes of judges; and now (1876) the same thing is brought about in the great changes in administering law in England.

## § 231.

There must be a division of labor in the judiciary system, as well as in the executive. Some transgressions of law are trifling, others are grave; some involve principles of law, others have to do with fact only; some are so important and complicated as to need the examination of more than one set of judges, in order that the settlement of them may be more fully accepted by those who are learned in the law. There will then be gradations of judges; the lowest rank concerning itself only with petty cases, while the upper decides in the last instance on cases of appeal. And yet it would seem expedient that the judges composing this highest tribunal should not be kept wholly aloof from ordinary cases of law which involve facts; for they would be tempted to become too abstract and estranged from the needs of life,—mere men of legal science.

What the divisions in a judiciary system ought to be, it is not our province, nor does it lie within our experience to determine. We only suggest the following considerations. *First*, while law ought to be cheap, some bounds should be set to litigiousness. Hence, the fees and costs ought to be large enough to deter one who is inclined to assert his rights unduly, and if a person appeals to a higher court against the advice of the judge and fails on the appeal, that ought perhaps to be a reason for an increased court due. *Secondly*, courts of conciliation for the trial of petty cases are of great importance in protecting the rights of the poor, and, indeed, of all classes in society. These cases generally need only a simple statement of the case by the parties without the help of advocates; the facts are for the most part admitted, and the aim of the court is either to render exact justice in clear cases, or to arbitrate in cases that are not so evident. Multitudes of cases are thus settled, which the complainant would never, on account of the expense, bring before the ordinary courts; but the great advantage is that a feeling is diffused through the humbler classes that society and its arrangements

exist for their protection, and not for that of those only who can employ an advocate. Such courts in different shapes are now spreading abroad through Europe, and deserve to be diffused over all parts of the world.\*

The principal divisions of labor, however, in judiciary systems are first that between the magistrates who  
 Jury. prepare the cases and the bodies which give the final decision, and secondly that between the modern judge and the jury. Other forms of dividing up the work, as when one body of men take down the evidence in writing and report upon it; and another with that evidence and the law before them make the final decision,—this is open to great objections. The first mentioned of these divisions of labor is illustrated by Athenian and by Roman practice. The Athenian system, as far as the point before us is concerned, required that the parties should appear with their evidence and witnesses, either before a public arbitrator or before a magistrate, who had the right of presiding in a court, and to whom the case according to law was committed. This officer heard the testimony, saw that it was reduced to writing, had it sealed up in a jar, appointed the day for trial according to a regular system, and when it came on he simply took his place as president of the court, kept order, called for the votes of the dikasts, had them counted, and announced the result. As for the rest, the system was extremely imperfect. There were no prosecuting officers; the dikasts were a body often unwieldy, on account of numbers; and, in fact, a detachment of the people carrying political feeling into the dikastery; suits for false witness were private, not public, so as to be attended with no civil penalties until after *three* convictions, except that the state and the injured party received equal damages; there was, for the most part, no appeal; and the appeals were only for special reasons from a decision of a regular or heliastic court; while the party in whose favor a suit was decided was thrown upon his own means for recovering

\* Comp. Dr. Lieber's civ. lib., chap. xix., end.

what the court had decreed him, with no help from the state.

In the Anglican race and to a considerable extent in other states enjoying Christian civilization, wherever facts are to be decided in private cases of importance, unless the parties renounce that mode of proceeding, and in public cases where the penalty goes beyond a trifling fine or a short imprisonment; a jury decides the facts under the superintendence of the judge. We have already spoken of the jury as an institution which took its present form not with any set purpose, but by growths and changes that took hold of earlier usages and shaped them towards liberty by an instinct of freedom. The first aspect of the jury, then, is its relations to the rights of the people. As the judges were appointed by sovereigns, and were then officers looking out for their fiscal affairs as well as for the public peace and security, their temptation was to neglect justice for the interests of their masters; or, at least, to be more watchful for the prerogatives of the crown than for the franchises of the nation. The principle of trial by a court of one's peers protected the feudal landholders against their sovereigns, and our common juries did the same for the nation; people served in this capacity, who were equally anxious for the public peace and for private individual rights. This position of the jury again attaches the people to the present order of things; for they see that their rights are protected, and especially that persons obnoxious to the government need not be sacrificed to its power. The decision of the jury in the trial of the seven bishops was like the trumpet resounding through the land of Israel in the year of jubilee. Another advantage of some moment from this institution is that it draws the attention of the people towards the courts and the administration of justice, by making them feel that they have a share in it, and by calling a few of them continually to a position where they learn something concerning the institutions of the country. Where there is no jury, where justice has not a popular side, there is danger of a suspicion that law in its processes is a jargon or



a mystery quite beyond the comprehension of the body of a nation; and so the notion of justice will be exclusively borrowed from the *dicta* of those who are wholly given to precedent. There was a time when it was possible to pack juries, to overawe honest and unprejudiced ones, to direct their decisions by a tyrannical exercise of judicial power; but these things for the most part passed away with the passing away of the subservience of judges themselves.

The office of a jury is to pronounce upon the fact, including, it may be, the motives, without respect to the law or the penalty. There are persons who think capital punishment undesirable, but it would be wholly wrong for them to be influenced in their judgment of the fact by that opinion. If a whole jury should have such a faith, the most they could do would be to recommend pardon or a lowering of the sentence on that account. In one case there is a question what is included in the fact. In cases affecting character, such as libel and slander, are the jury to determine only whether the slanderous or libellous words were uttered by the person complained of, or are they to judge whether the statements were true or false? The point here raised is of especial importance for the liberty of the press and for the full discussion of personal character; which, if unaccompanied by malice, is often important for the interests of society. The answer which would be given in this country in cases of libel would be that the truth of the charges made could be brought before the jury in mitigation of damages, and the same rule must hold in cases of slander.

As the jury is in a certain sense a check on the judge, who would be invested with a fearful power, if he could have law and fact in his hands and could obstruct the course of appeals; so the judge has a control over the jury first by his charge, and then by a new trial. Thus, if the jury system had no imperfections, there would be as near an approach to honest, intelligent justice as is possible in consistence with the fact that ignorant persons are sometimes found on a jury and incompetent judges on the bench.

There might be an approach to justice, we mean, if certain defects were removed. The leading one of these is the *necessity of unanimity*, which would be almost impossible for twelve men sitting on a case without being sworn, and which must often be brought about, in the case of a jury where it has retired to decide upon its verdict, by a part who are less firm, yielding to the rest against their conviction or without conviction. A change is desirable in civil cases so that a majority could bring in a valid verdict; not a bare majority, but one large enough to indicate a decided balance of opinion. Two-thirds or three-quarters would not be too few. In criminal cases involving the loss of life or long imprisonment, perhaps we must stick to the solid vote of the body; and yet one obstinate man has saved multitudes of prisoners from just punishment. And this is due not necessarily to improper motives but sometimes to a tenderness of conscience, an awakened sense of responsibility, which looks on convicting one who can by any possibility be innocent, as something awful; as if there were anything for the jurymen to say but that his prevailing opinion inclines to the condemnation of the prisoner.

Another evil seen in modern times is the great unwillingness to serve on juries of those who are the best qualified to perform the service. It falls therefore to an inferior set of men; many involved in large business or disliking the company or the discomfort and excitement will pay their fine rather than sit. The office of jurymen must therefore sink,—it has sunk, in public estimation, and with it must fall, if this is to continue, the confidence reposed in their decisions. Some feel that a board of judges would do better, of which we are wholly unable to form an opinion. It may be mentioned as a curious experiment that in one of the United States the choice has been given to certain criminals, at least to those tried for murder, to submit their cases to two judges without a jury.

While some might regard a jury of twelve, if unanimity were required, as too large, others might wish to have it con-

siderably increased, and allowed to decide without being unanimous, say by a majority of two-thirds. What would be the effects of the increase? Perhaps a small increase might add to the weight of the verdict; sixteen, for instance, out of twenty-four, would carry opinion with them more than eight out of twelve. Perhaps it would prevent any one or two men from controlling a jury when they had retired for the verdict. Perhaps it might on the other hand increase the practical difficulties of finding a good jury, and somewhat change the style of addressing them. Certainly, if they were augmented to four or five times the present number, much of the calmness which now is usually demanded in the proceedings in jury trials would be lost. If, on the other hand, it is now possible for a party in a suit to bribe one or two jurymen the motive in that case would be diminished.

### § 232.

The question how shall the judges be appointed is a very important one. In most of the monarchies of Appointment, tenure, and salary of judges. Christendom, they are appointed by the crown; under the constitution of the United States and in several of the states they are nominated by the chief executive officers, and chosen or rejected by the senate or by both houses of the legislature; in other states they are voted for by the people, like other officers, whenever a seat becomes vacant. Absolute appointment has its advantages in constitutional countries, for the sovereign will generally, and in England, will prevailingly follow the opinion which prevails among his advisers. There will be less reference to political considerations than there would be in our country, where a great and wise lawyer of the faction out of power would stand a small chance of election. Of all modes of appointment the worst is that by direct vote of the people. This appears from several considerations. 1. The people know little of the men out of their own district who are fit to make good judges, and the talent which is best fitted for this position is not often of the kind which attracts the public eye; sound-

ness of judgment, moderation and impartiality, love of truth, are not brilliant qualities. 2. The candidates for the bench submitted to the people will be selected generally by a party convention and the place be offered to a party man. But entrance into the office of a judge, because one has been a faithful servant of a party, is a poor omen for fidelity and impartiality. There is no one who needs to cast off all immediate connection with a party as much as the judge, and this is very difficult, if his most intimate relations have been those of party, and his feelings are strong party feelings. 3. It tends to lower the office of the judge if he is elected as a servant of the people. Popular election proceeds on the principle that the people is the source of all power,—which is true, in the last resort,—and that the persons elected are agents of the people. But it is less true of judges by far that they are agents of the people than of any executive officer. There is nothing falling within the sphere of judicial action concerning which the judge can properly inquire what the people think or prefer. The same is in a degree true of the executive, but not to an equal extent of the legislative department. The existing law—from whatever source it comes—and the facts of the case the people have nothing to do with, as far as these bear on the trial; the law can be altered for future cases, the verdict can be set aside perhaps by executive pardon, but the judge knows only existing law with its principles and the irreversible facts. Now election by the people tends to make a man feel that he is the servant of the people who live at the present time, not of the law nor of the constitution, which is the voice of the people for all time. How can this fail to injure his firmness and his righteousness, especially in cases where a political criminal has the people strongly for him or against him? Even moral lessons the judge may not go aside from his strict duty to teach; how much less can he use his power as the people would have him, against the claims of justice? But he will be apt to do this, if he depends on the people for his power. On the other hand, the executive, or the executive and legislature, come and go; no per-



manent relation can be established between them as electors and the judge as elected.

The term and tenure of office are equally if not more important. It is now so fixed a principle that the Term of judge's office. judge shall hold office *quamdiu se bene gesserit*, and not *durante bene placito*—a principle which has been demonstrated as far as experience can demonstrate, by English history—that we may spare all words on the subject. He is indeed responsible for the use of his power of decision and for the motives of his judicial acts; and every misdeed committed by him ought to be punishable more heavily than those of any other public officers. He should be subject to impeachment, degradation from office, or loss of citizenship; while heavier crimes, such as bribery, might well bring on him a heavier penalty, such as perpetual imprisonment. For he of all public officers knows best what crime is, and has to do continually with moral principles.

The question arises here whether there ought to be a superannuation for a judge, or term of age beyond which he cannot serve. And here two considerations meet us, the first that judgment, the quality most important for the judge, is one of the last powers to fail, and the other that different men begin to fail at different periods of life. There has been no time fixed in the provisions of state constitutions for superannuation, as there is none in the constitutions of different men. In most of the United States seventy, in a few, sixty years have closed a judicial life; in the general constitution there is no term at all. It is a curious circumstance that one of the greatest jurists we have ever had in the United States, Chancellor Kent, became superannuated at sixty under the then existing constitution of New York, after which he fulfilled the duties of a professor of law and wrote his four volumes of commentaries. That was certainly a happy constitutional folly which forced him into a sphere where he was to become the instructor of thousands in all the states of the union.

On the whole, considering that the tendency of old age is to cling to the past, and to be slow to receive improvements

in law, and that cases of obvious decay require to be attended to by themselves; it would be well to have some kind of arrangement by which a judge who is really incapacitated shall, on representations from the bench and perhaps from the bar, be invited or forced to resign, a retiring pension being given him. Such a suggestion needs to come from others, since a man is often unconscious of his own decay.

In regard to the salary of the judge it is hardly necessary to say that it ought to be liberal, so that men of the best talent; who in middle life seek rest from the contentions and worrying details of a lawyer's work, and would gladly devote themselves more to the science and less to the practice of their profession; may be induced to accept one of the most honorable of offices. Otherwise, if the salary were mean, the office would be filled with third-rate men, their decisions would command no respect, and there would be less stability in the system of justice. The salary also ought to be independent of the work done by the judge, not derived from fees in whole nor in part, since this would degrade the judge and put him under temptation. With still greater reason ought it to be so far fixed, as not to be diminished during his term of service. This is made a provision of some constitutions, and with reason; because, if such reduction were allowed, it would be applied, as a political weapon, to drive out of office a judge obnoxious on political grounds to the legislature,—perhaps obnoxious on the ground of his interpretations of the constitution.

The term of office, furthermore, ought to be limited according to previous remarks only by intellectual incapacity or moral delinquency; in other words, it should be for life and not for a short term of years. Formerly this tenure, perhaps with the limit of superannuation at some period of life or another, was universal, we believe, in the states of the union; now a large part of them have given up this plan for a short term of office, varying in different states, but not generally exceeding a decennium. In most states these short-term judges are chosen by the people. The reasons that led to

this change, which we regard as greatly for the worse, seem to have been mainly two. *First*, now and then an incompetent man would be appointed on political or personal grounds, or a certain section of a state clamored for its share of offices, and had no good material to make judges out of. It seemed a grievous thing, after such a man was tested, to endure him for a lifetime. Thus a selection made for unworthy reasons broke down a good system: the spirit of party was listened to where it ought not to have any weight; it created bad judges, and bad judges called for a remedy, and there was no other remedy so long as the intense party government prevailed, but that of "changing the place to feel the pain."

But the practice spread, not because judges were bad—for in general this was not the case—but for deeper reasons. There seemed to be something undemocratic in suffering a man to fill one of the most important of offices for a lifetime; it was like having a king; and especially inconsistent did it seem with our institutions, when such an appointment was left to the governor and the legislature. Why this exception to the temporary tenure of all other offices? Add to this that by popular election of judges there would be more chance for inferior lawyers to gain high honor by the help of party connections. The salary, it is true, would be less than that which they were now earning, but they could be tolerably sure, after serving in a judicial office, to go back into the rank of lawyers with a greater prestige. An "ex-judge" could command better business than he had in his previous career at the bar, both on account of his title and of his experience in the work of courts.

The experiment in some states has been attended with woeful results. A recent attempt to go back to the life tenure, seconded, we believe, by the leaders of the bar in the state of New York—where judges, resembling the prætor Verres or Scroggs, had been created by a political vote, and turned out to be so bad that they were deposed—proved unsuccessful; for the people would not change the constitu-

tion in this respect. And there is no present probability of any steps in the direction of a longer tenure or of a better mode of election.

§ 233.

The lawyer, as an advocate present in the courts and taking the place of his client, is an essential part of civil and criminal justice in civilized countries. In criminal trials, where, above all, a man may demand to have his rights protected, some of the freest countries have not until recent times granted to the accused this privilege. In indictments for treason the accused were allowed to have counsel in England by a law of William and Mary (7 Wm. III.), but in trials for felony not until 1836. This great injustice seems to have taken it for granted that there was presumption of guilt in being indicted; but why should such a presumption prevent my clearing myself in the best way I can. There seems to be more reason in allowing counsel to the suitors in criminal than in civil cases. The reasons for allowing counsel are chiefly these. The first is that there is more equality between lawyers on the whole than between suitors on the whole. This reason has especial force in criminal trials, where the government prosecutes through an attorney. The counsel of the accused will generally be more nearly the peer of the government officer than the criminal can be. Many innocent men, when arrested on suspicion, are unable to state their case or defend themselves with any kind of skill. Another is that the accused person needs some protector; for although prosecuting officer and judge ought to feel that they are the representatives of justice only, they seem to be apt to have a hard feeling,—the one, as if it were the main thing to prove his point, whatever be the truth; the other, from the habit of estimating accused persons by their look and manner, or from distrust of men and belief in the badness of human nature which experience in courts may inspire.

The advocate, being allowed to take the place of his client,



is to do whatever his client ought to do, so far as he can form an opinion. The object is not simply in criminal cases to prove or disprove guilt, but to prove or disprove the propriety of conviction on the evidence submitted by the prosecuting officer. Whether the criminal, if conscious of guilt, ought not to confess it in open court as a matter of duty, is not a jural but a moral question. The jural point is to find out the truth according to the evidence. In all cases the advocate is bound to abstain from offering any evidence which he knows to be false. But he may, even if he knows from his client that he is guilty, seek to prove that according to the evidence he cannot legally be shown to be guilty, just as the client himself, if arguing his own case, might do according to the rules of trial.

What evidence ought to be admitted in courts, and whether for special reasons certain persons, sustaining a close relation to the accused person,—such as a wife, a legal counsellor, or a spiritual adviser,—ought not be called on to bear witness in his case, are matters that do not concern us here. There is a tendency since Bentham's time to introduce a wider range of proof than was before allowed,—to receive the testimony of the parties themselves and of others before excluded. We may thus be approaching a time, when, if a man refuses to testify in his own case, it will be presumptive proof that the case is a bad one; as, when torture of slaves was allowed, to refuse to subject one's own slave to torture if challenged by an adversary, or to admit the adversary's slave, was a point that would be pressed before the judges\* by the opposing party.

\* This was actually pressed at Athens, and in general the testimony of slaves there was more valued than that of free men, which shows the untrustworthiness of a free Greek. Comp. Hudtwalcker von d. *Diaeteten*, p. 51, and the passages there cited in the notes. Demosth. c. *Onet.*, i., p. 874, is especially in point. On the other hand, the fact that slaves, who could not hold out against pain, would often testify what they thought would free them from torture soonest, was urged against witnesses of this sort. Arist. *Rhet. ad Alex.*, chap. xvi., 2.

## CHAPTER X.

### INSTITUTIONS, LOCAL GOVERNMENT, SELF-GOVERNMENT.

#### § 234.

THE common law of England has been called *lex non scripta* as distinguished from the *lex scripta*, or statute law. When we speak, however, of unwritten law, it does not of course follow from this language, that every law included in the list of laws so named, if always unwritten, did not originate in some will of a tribe or community, expressed at some definite time and then imposing an obligation on the people, or possibly in some will of a sovereign imposing obligation on his subjects. Such statutes or laws, formally passed, may have been trusted to the memory of judges without being reduced to writing, and they, as judges now do, may have applied them or the principle contained in them to analogous cases. Or the principle of the law in one country may have been adopted without legislation in another. In this way a law grew, as it does now, and the best things in it may have come from just or equitable decisions after the law was once enacted, without any knowledge or memory on the part of the people of this extended significance. Law grew, just as words grow, while a nation continues to live.

But if a *lex non scripta* can be supposed to have in part such a positive origin, we cannot justly say that all law so originated. The farther back we run into the antiquities of nations, we find laws *made* to a less and less degree. In small primitive societies this function of law-making was of little use, because relations were quite fixed, and progress slow. Nor can we suppose that legislative foresight, when it

called forth laws, anticipated the creeping in of new usages and customs. It rather recognized and sanctioned customs which already existed. There must have been customs to a great extent which communities admitted, which guided the decisions of judges, and were widened in their application ; until at length codes, or collections of usages that all acknowledged to have a sort of binding force, expressed in clearer terms what a large tribe or community admitted to have the force of law, or modified that which had become questionable, and added some new matter.

If we can conceive of communities, chiefly of primeval ones, as thus passing from customs to unwritten law, from unwritten to written, we may form, perhaps, a juster conception of what are called *institutions*. How are these related to laws ? How do they differ from one another in the course of time ? How do nations differ from one another in the capacity to form them ? What are the different kinds of institutions ?

If customs grow up in early societies until they have the force of law, this is a kind of unconscious process, in the same way as the steps towards the invention of machines which help the arm and leg are at first unconscious, that is, without previous plan. The customs will vary in different communities, because man himself varies, until races, dialects, national feelings are produced by such tendencies to variety, and in their turn add to the variety. The laws or customs that thus arise express the relations between men in a community to one another and towards the community as a whole. But law may also, as it works in modern states, establish something positive, for instance may found a bank, charter a city, set up a police system, create a bench of judges. The law gives rise to these forms of human activities in definite spheres and we call them *institutions*, as being set up or established. Thus in the word we express the fact that while law in itself has no power to act itself out or by its inward energy to control life in the state, it can impart an independent, permanent energy to something else in the state ; it can

create, but not execute ; give birth, and life, but not properly of itself live.

An institution, then, depends on the will or consent of the community for its existence, but yet has a lasting independent life of its own ; it is capable of growth and expansion ; if national, it may perhaps acquire such a separate power of its own that law, that even force, cannot easily overthrow it.

In this way we may define an institution as looked at in an age when law, in the sense of positive enactment, controls the whole political life of a nation. But an institution of the early times bore just the resemblance to one of the present age, which custom before positive law bore to positive law. It grew up as personal habits grow up, without any distinct intention on the part of the individual, or as usages grow up in a community without the aim of making innovations. The habit, the usage, acquired a sway over the individual or in the society, before it was noticed and recognized. And it answered to a political or social want to such a degree that it entered into the thoughts and habits of a people, it became easier for them to discharge political duties in this way than in any other, it thus was perpetuated without any conscious attempt to perpetuate it ; nay, if perchance attacked, it would rally multitudes in its defence, as a national tune or dish which a tyrant strove to prohibit would seem very much more precious than before, more precious than many things of far greater importance.

The growth of such institutions is one of their most remarkable qualities. In a later age there is very little of this characteristic pertaining to institutions which are founded entirely by positive law, without being copies of antique ones. They stay where they are put, they do not spread their roots around by an inward life of their own, but are as closely confined within their own limits as are laws themselves apart from the expansive power of judicial precedents. The institutions of early times have no such fetters on them, but form themselves into something larger, and



until they reach a certain maturity take a continually deeper hold on the national life and feelings. They have, then, these two qualities, the *first*, that of *growth* by the force of national habit, the *second*, that of *subsequent expansion, accommodation, and playing in with other national institutions* of similar origin. During all this time law accepts of them, but, as it did not originate, so it does not modify them. At length comes a time, when, either from a change of national feeling, or from the love of system seen in codification, or from change of political institutions, they are altered and accommodated to the rest of the political fabric. It may be, also, that, at this advanced period of a nation's life, many new institutions somewhat similar are created by law, which may have the same self-subsistent, permanent life as the old ones. This depends on the fact whether a given nation is true to its earlier habits or has lost them. In general it seems to take a long time before the habits of institutional nations, as Dr. Lieber calls them, can be forgotten or become inoperative. No new institutions are then found growing up in such countries, but the old ones, remodelled or reproduced with some new principles, may still continue.

*The nations* and races which have been most remarkable for their institutional character are, Rome in its earlier days, before law stiffened and froze national habits, England, with some other portions of the Germanic race, India in early times, while the Celtic and Slavonic races in the political sphere have had less of this character. Among the Greeks, Athens in its later history shows little of it, and the same is true of the Ionic race in general; but the Dorians, especially Sparta, had the opposite character. *Among the eras* when the institutional spirit had been most active within the historic period, the middle ages all over western Europe deserve especial mention. It was then, in a new form of society with considerable vital force, that small territories were left to themselves, without much intercourse with each other, to lay the foundations of a new social and religious society on the

ruins of a decayed civilization.\* *Among forms of government* those swayed by will, as despotical monarchy, extreme oligarchy, extreme democracy, are not favorable to institutions. Thus Louis XIV. disliked parliaments and the meetings of the three estates, as being essentially checks on his power. In the extreme democracies and oligarchies, in fact, there is no steadiness, because there are no political habits; a new device is tried by the reigning party to secure its own triumph. In larger states of the same kind, the sway of the majority is the first principle, and any barriers that resist unconstitutional aggressions, even constitutions, are themselves thrown down if possible.

Usages and institutions arise and grow within the religious sphere as readily as within the political, and perhaps in the right circumstances grow there more freely. Religious usages and institutions. We refer here not to positive enactments in religion, like circumcision, baptism, and the Lord's supper, but to such as develop or support a religion in its practical workings in a particular direction. An instance of usages extending far beyond their original limits may be found in the thanksgiving which has spread over the United States from New England without any law whatever. Instances of religious institutions may be found in the order of prophets, which, although a part of the Jewish system at a very early date, outgrew its first form, associated itself with schools, with literature and history; so as to become the most efficient support of religious life in the nation against political and religious corruptions. The oracle of Apollo at Delphi, with the temple worship which supplanted earlier shrines, became allied with politics and with religious festivities, and was the capital of Greece more than any other spot. The papacy in its growth as a religious institution is still more marvellous; borrowing the prestige of Rome and resting on

\* Beaumanoir, in the prologue of his *Customs of Beauvoisis*, says that "on ne pourroit trouver ès royaume de France deux chasteleries, qui uzassent d'une mesme coustume." I owe this citation to a French author.

a few sacred traditions, by its aim at church-unity it was able to grow into a power all-embracing and superior to all political institutions whatsoever.

Religious institutions thus seem to spread more easily than political ones, the reason for the difference being that the former take hold of the religious nature by presenting objects of worship conceived to be real, and to be able to do good or harm as they are neglected or honored. They are also connected with social life by festivals, public sacrifices, processions, and the like. Hence, heathen religions, within certain limits, spread from nation to nation, so that it may be hard to say what gods are indigenous and what imported. The Christian religion has difficulties in establishing itself arising from its severe morality and spirituality, although it has in itself an eminent power of organization.

We have mentioned two types of institutions, one that appears in the older primeval period of national life, and another that appears in the period when the political habits are already established. The first are political habits which have no positive origin in expressed public will, which grow and unite themselves with other political habits, until they reach their full stature; which may then be modified by law, so as to become better expressions of the new political state of a people. The others are copied after them, or borrow suggestions from them, or carry out further certain principles which they contain, or are brought in from a foreign birth-place. The first Dr. Lieber calls *crescive*, a bad word which may be endured, as it can denote that which not only first comes up in the soil of national life, but grows up afterward; the other he calls *enacted*, and when the first are modified by law, he gives them the name of *mixed*. Dr. Arnold confines the term institutions to those only that grow. "By institutions," says he, "I wish to understand such officers, orders of men, public bodies, settlements of property, customs or regulations concerning matters of general usage, as do not owe their existence to any general law or laws; but having originated in various ways at a period of remote antiquity,

are already parts of the national system at the very beginning of our historical view of it, and are recognized by all actual laws, as being themselves a kind of primary condition on which all recorded legislation proceeds. And I would confine the term *laws* to the enactments of a known legislative power at a certain known legislative period." \*

There is much that is excellent in this short explanation of what institutions are, but it labors under several defects. One is that, if we can get at the original of a so-called institution and explain how it grew up or how it expanded, it will cease to have a right to the name any longer. Another is that if remote usages, deserving the name of institutions, should afterwards be codified, or somewhat altered, or made parts of an enacted constitution, they would cease to be institutions thenceforth. Still another is that which Dr. Lieber makes prominent; that Dr. Arnold speaks of officers, orders of men and public bodies, as if the institution was nothing in itself, apart from those through whom it bears upon the community. It is true that, although laws can be conceived of without men to execute them, the men are an essential part of the institution, they are that through which it acts; and so we may say of the jury system, that the office of determining the evidence in certain cases at law is inconceivable without men who perform it; but the acts which they perform are the essential part of a jury, it is the spiritual, immortal side of the system, while the men are the body.

Dr. Lieber's view, as it is a studied one and not thrown out in a paragraph like Dr. Arnold's, is more satisfactory, yet where he says that "it is a system or organic body of laws or usages forming a whole of extensive operation or producing widely spreading effects," we may criticise the last part of his definition. For there may be a system of laws, like a bankrupt law or a tariff, which is certainly not an insti-

\*Lecture first on Modern History, p. 35, Amer. ed., 1845. Dr. Lieber's discussions on institutions are in his *Civil Liberty*, lectures xxv., xxvi., pp. 297-373, of ed. 3, edited by the writer of this work.



tution, and there may be institutions which have no extensive operation. As for the rest, we warmly commend his whole exposition of this subject to our readers.

The effects of institutions in concentrating national feeling at certain points, and in thus furnishing something tangible and positive, where a nation can find shelter for misgovernment, deserve the attention of the political student. Yet as the quality of permanence may belong to institutions which are opposed to freedom, so that freedom can be secured only by change; they may be evil in their influence as well as good. The village communities of India and of other countries on which Sir Henry S. Maine and others have shed so much light, are strictly institutions, although more social than political; they grew up everywhere, out of a feeling of relationship which regarded the community as holding lands in joint ownership, and more or less prevented strangers from having property or even a settlement within the bounds, without the community's consent. Thus a great part of the intercourse of society is cut off, and where, as in India, caste is added to this, progress may be effectually prevented. The community may regulate its own affairs, but the feeling of freedom never steps beyond the limits of the place.

A few examples of institutions that have grown up and acquired strength as they went on, may be of use to show how important a part they have played in modifying and even giving new direction to political systems.

### § 235.

1. The Ephorate at Sparta or board of *overseers*. These were five in number, annually chosen from all the Spartans, rich and poor; and may have been vicars of the kings in early times, like the *præfectus urbis* at Rome. Their functions were that of judging in cases of contract and that of a police. This somewhat vague police power must have aided the development of these magistrates, as they followed without doubt both usages and old customs, and their own sense of propriety. They were also aided, appa-

Illustrations.  
Ephors of Sparta.

rently, by a change of feeling in the community towards the kings, by a certain suspicion of them, and this feeling may have been coincident with inequalities of fortune which gave rise to a democratic element. Hence the ephors themselves were called by some Greek writers the representatives of the democratic element, and this was so far a just opinion, as they could be and often were selected from the inferior rank of Spartans, and became the checks on the growth of the aristocratic element in the constitution. Their power was arbitrary as well as great. "They are competent," says Xenophon (reip. Lac., viii., 4), "to fine whom they will, and have authority to exact the fine on the spot, and to depose magistrates during their offices, to imprison them and even to bring them to capital trial." Their power in checking the kings was certainly an innovation (K. F. Hermann, § 45). They called and managed the assemblies of the citizens, received and sent ambassadors, arranged campaigns, and a deputation of two of their number accompanied the kings to the wars. We abstain from further particulars. Enough has been said to show the original idea and the additions due to later times. All these additions fastened themselves on the primeval police and judicial power.

2. The *Roman tribunate*. In the case of this institution, —intended at first as the organ of the *plebs* to afford aid to such as invoked aid against the magistrates of the citizens with full rights, and although without any *imperium*, yet clothed with a sacred character,—we have its origin, growth, and ultimate form, with its efficiency in the state so fully set forth in history and by writers on the Roman constitution, such as Lange and Mommsen, that it is unnecessary to do more than mention it as a very striking example of an institution growing in competence and importance far beyond its first limits.\*

The Roman constitution affords several other instances of the development of a power or office from another, until it

\* See Lange, Röm. Alterth., i., § 85, and ii. and iii. passim; Mommsen, Röm. Staatsrecht, ii., i. p. 247 and onw.; as also his history.

acquired great dimensions. Such, for instance, was the *censorial* power, an offshoot from that of consul, and the *imperial* power or *principate*, which shows the same growth by aggregation of several magistracies into one. (Comp. § 166.)

3. The *major-domus* or mayor of the palace was an office which, somewhat like the viziers of the sultans of Bagdat and about the same time, yet from smaller beginnings, took its position ultimately as the first power in the state. The name belonged to the principal *domesticus* or house-servant, who appears in the palaces of the kings of various German tribes, as of the Franks, Burgundians, Lombards, West-Goths, and Anglo-Saxons. The name *domesticus* was borrowed from the Romans of the lower empire, where certain officials attached to the emperor's person were so called. Under the Frank kings of the first line some of these *domestici* are found entrusted with the care of the king's palaces and provisions, they manage his estates, they are present at his decisions in courts, they even act as provincial magistrates, sustaining the duties which were ordinarily committed to counts. The *major-domus* was, at first, simply the head-servant of the house, and answers to the seneschal (from *sin*, a German root denoting *duration*, *age*, *force* or *prominence*, and *scalk*, Ger. *schalk*, servant, old or head-servant; as *marescalk*, our *marshal*, denoted horse-servant). *Major* in *major-domus* has left its descendants in the Germ. *meier*, *maier*, a steward or bailiff, then a tenant of a farm, in the Fr. and Engl. *maire*, *mayor*, who must originally have been the seignior's officer to look after his revenues in the city. The *major-domus* was also called *senior-domus*, *major-domus-palatii*, and by other names.

The *major-domus*, par eminence. or, as we will call him, the mayor of the king's palace, came, as the head domestic, to have important political as well as other functions committed to him. The education of young boys trained up in the king's palace for the king's service, the maintenance of discipline and peace among the magnates and in the land, the education of kings who had succeeded to the crown in their

minority, probably, also, the care of the royal domains and collection of the taxes and dues for the fisc, fell into this officer's hands. Although a private and household officer, it was the easier for him to go beyond the boundary of a private agent, because, in the Frank kingdom, under the first line, there was no exact limit between private and political authority. As being near to the king's person, he managed a great variety of business; and hence, when the *major-domus* in Burgundy died, the magnates refused to choose another, because they wished to treat with the king directly. (Waitz, *D. Verfassungsgesch.*, ii., 426.) This fact seems to indicate that the *major-domus* had become a king's vicar, and a representative of the aristocracy.

Besides inferior *maiores domus*, there were three especially who came to be prime ministers, and also generals in chief, or commanders in war of the vassals of the Merovingian kings. These were the mayors of the Austrasian or East Franks, of Neustria or the West Franks, and of Burgundy. Among the East Franks the office became hereditary in the family of Pippin of Landen or Landes, who lived in the seventh century (A.D. 628) and managed the affairs of King Dagobert during his minority. The son of this Pippin, Grimwald, was powerful enough to attempt to raise his own son to the throne, but he found small support and was put down. Ere long, however, in the person of Pippin of Heristal the office and power of the mayors in Austrasia were restored to the family. Pippin, as duke of Austrasia, turns his arms against the magnates of Neustria, and is able, after the victory of Testri, to set up one of his own sons in the office of mayor in that division of the Frank kingdom (A.D. 687). Soon after 714, the illustrious son of Pippin, Charles Martel, succeeded to the mayoralty; and after surmounting the great difficulties of his first years, (growing out of contests with his family, with the grandees of the Franks, with the German dukes, with the Saxons and Frieslanders,) became the savior of Europe by defeating the Arabs in 732, at the battle of Poitiers. He was king of the Franks in fact, although not



in name ; and at his death in 741 divided the three great mayoralties among his sons. The weak Merovingian kings had now become puppets in the hands of the mayors. His son, Pippin the Short, after putting down his own brothers and being now, *in fact*, king of the Franks, suggested to the pope whether it would not be well to make him such by a solemn, religious consecration. The pope entered into his views, the magnates consented, and so he became in name the first king of the dynasty of the Carolings. He was succeeded by his son Charles (Charlemagne), who, in 800, was crowned by Leo III. emperor of the west, and got into his hands nearly all of central Europe.\*

The history of this office affords a very striking illustration of an institution growing up without law, by the force of circumstances that favored its development. One of these favoring circumstances was the political and personal weakness of the Merovingian kings. Another is that the East Franks were the most warlike and uncorrupted by vices of all the portions composing the Frank kingdom. Still another is that the most powerful family among the East-Franks retained to a good degree the support of their brethren in the aristocracy. They also ingratiated themselves, notwithstanding arbitrary acts relating to ecclesiastical property, with the leaders in the church. It is noticeable also that great ability through a number of generations distinguished a family which after Charlemagne ran down and ran out.

When the descendants of Pippin of Heristal became kings, they abolished the high office of mayor of the palace, lest others should climb by the same ladder. After this, and perhaps on this account, the old word *sénéchale* came again into vogue.

The *feudal system* itself presents to us an instance of a vast and complicated institution, growing up out of the union of vassality, the beneficiary holding of property and terri-

\*Comp. Waitz., u. s., ii., 411-428 (ed. 2) ; Roth Beneficialw., p. 236, 309, 357 ; and of older writers, Löbell ; Gregor. von Tours, p. 183 ; Perz ; Hausmeier, (Hanover) 1819.

torial jurisdiction,—or immunity from the counts' control,—together with military obligations attached to the tenure of land. (Comp. § 170.) Another fine example also of the growth of institutions is furnished by the rise of the mediæval towns in a large part of Europe. But of these we have either spoken already or they are too vast a field for the present essay. The same may be said of the new growth of monarchy in Europe, after it had lost nearly all its powers by the encroachments of the feudal nobility. This is an institution, the highest in the state, rehabilitated in conformity with the new wants of society for unity and order, which wants did not act with any plan of reform, but in a blind way and by a thousand new steps in the dark. An institution of the French monarchy,—the parliament,—we may sever from the other instruments of its advance as an additional instance of the growth of institutions and as being within the compass of the present sketch.

4. The French Parliaments, especially the parliament of Paris. The word *parliament*, from *parabola*, a parable, which came to be used in later Latin in the sense of *word* (Span. *palabra*, old Ital. *paraula*, Fr. *parôle*), gave birth to *parlare*, *parler*, and these to *parlamento*, a talk, a parley, a meeting for counsel or assembly, a *council*, parliament. Hence in French and Italian the derived verbs *parlamentare*, *parlementer*, denote the holding of a parley between officers respecting the surrender of a town, and a cartel-ship is called a *parlementaire*. (Comp. § 183, p. 62.)

The kings of France held their *curiæ*, like their vassals, where both deliberations on public affairs, and important trials took place. Here were gathered the great royal officers, the bishops and abbots depending immediately on the king, some inferior crown-vassals, and royal counsellors skilled in law, lay or clerical. At first, matters of state and matters of justice came before all called to the council or *curia regis* alike. In the thirteenth century this curia was divided. The meeting where the affairs of state were considered, bore the name of *consilium regis*; and that where trials at law were

decided bore the name of *parlement* in the thirteenth century. It would seem that at first the king presided in both, but rarely took his seat in the court of justice. The separation, which commenced under Philip Augustus, (A.D. 1180-1223) was made complete under Louis IX. (1226-1270). The sittings were to be at Paris. The members who attended were chiefly councillors skilled in law, the *grande*s apparently feeling their incompetence to deal with such matters. The process was either by *arrêts*, that is by decisions on prepared cases submitted by the advocates of the parties, or *enquêtes*, where the evidence was brought before the parliament itself. Besides these proceedings, *mandates* or *precepts* were issued, granting a time within which the parties could make up their cases. The competence of the parliament included especially cases of appeal from the provinces, cases of the king against a town, cases where a commune had a litigation with its feudal lord in regard to the extent of its jurisdiction under its charta.

The parliament of Paris received its substantial form under Louis IX. ; but successive ordinances from the reign of Philip the Fair to the "*great ordinance*" so called, of 1453, completed its organization. Instead of changing at each session in its composition, it consisted of the same members, who at length were appointed for life. It was now composed of both paid and other members ; those who received no pay answering to the principal persons invited to the old *curia regis*; who however tried to get rid of the service, as much as possible, and only appeared on special occasions. Prelates could not be chosen as ordinary members of the parliament, and not long afterwards baillis and seneschals were forbidden to sit in them. There was, under Philip the Fair, a division of the parliament into two chambers corresponding with the special business. The chamber of *arrêts* or decrees was especially called the parliament ; while that of *enquêtes* was itself divided into two, and in 1320 a chamber of *requêtes* was added. In the fourteenth and fifteenth centuries other parliaments, sometimes looked on as branches of that at Paris,

were set up. The jurisdiction of this latter court embraced, in 1453, cases touching the royal domains, the regalia and high criminal justice ; the suits of the peers of France touching the lands held by them as peers and their *apanages* ; those of prelates, chapters, counts, barons, towns and their *chevins*, and of other communities and high personages, who were allowed by privilege or usage to have this for their regular court. These with appeal-cases from all parts of the kingdom, unless where a grandee had received a special privilege *de non appellando*, formed the principal business. After the foundation of other parliaments this competence of the parliament of Paris was restricted.

A special function of this court gave it a certain political bearing. We refer to the registration of the royal ordinances, and the right by usage which the parliament acquired of refusing their assent to such registration. This right grew out of the practice in early times of making known the ordinances at the meeting of the *curia regis*, where they would naturally be known and even published, since the *baillis* and *seneschals* of the various districts where they were binding would be there assembled. In process of time the parliament or judicial side of the *curia* kept registers, and before the ordinances were made known examined them and offered their objections against them. From this grew up the usage, where no such examination had taken place, for their secretary to add a note in the register that the parliament had not consented to the ordinance in question ; and from this the further usage or right to make objections against ordinances and refuse to have them enregistered. The first case of this kind occurred, it is said, in 1411. The kings at an early date felt that this was an invasion of their sovereignty ; but such was the prestige of the supreme court, that Louis XI. gave way to their remonstrances, on an occasion when the president of the parliament, with the counsellors or members, appeared in their robes before him, and threatened to lay down their offices sooner than be forced to register the edict laid before them. Such force was practised, in a session where the king was



present and which had long been known as a bed of justice, in 1563—for the first time. Thus the beginnings of a power over the laws, answering to that of the English parliament, were resisted by the growth of arbitrary power. If the parliament persisted in its opposition, it might be banished from Paris or dissolved; or its members be visited by *lettres de cachet*. But as it was a necessary institution, it would soon be restored to its old standing. The later kings qualified this power of registration.

The history of the French parliaments is interesting, as far as their institutional character is concerned, because, while they were rooted in early Germanic usages, they departed from their earlier form in their later development, and were then variously modified by positive enactments.\*

5. Pensionaries, as the word is applied to the grand pensionary of Holland. A principle of old German justice was that there could be no court, unless the people qualified to sit and vote in the court were assembled. Before Charlemagne, when among the Franks, the people (as of a hundred) were called together; there were certain persons, seven in number, called *rachimburgi*, whose office it was, not to bring in a verdict, but to prepare a project of a verdict which was to be laid before the assembly for their approval or rejection.

The meeting of the free inhabitants of a hundred for purposes of justice became an intolerable burden, especially because the judge could call them together when he would, and in case of the non-appearance of a freeman could exact from him a fine. This power of the count or his deputy opened the door to great abuses and ground down the poorer freemen. By a law of Charlemagne the body of the freemen were excused from this service in courts, and only the seven *rachimburgi* were required to be present; who thenceforth were no longer to be chosen for the present occasion, but to be an official, permanent body, in a sense assessors of the

\* Much has been written on the parliaments of France. I have followed Warnkönig, *Franz. Staatsgesch.*, vol. i., in various places, as in § 183.

count. This change was connected with a change of name; they were now called *scabinei* or *scabini* (from the root *scafan*, to draw out, to ordain), a word which, in various forms, and sometimes with a loss of its original sense, appears in several languages, and shows the spread of the institution.\*

In many of the towns, especially in Germany, the Dutch provinces and Flanders, the *scabini* formed an upper class of inhabitants, from whom the town councils and the principal boards of judges were selected. At the time when the *Sachsenspiegel* was composed, the word *schöffenbar*, i. e., capable of becoming a *schöffe*, denoted a hereditary rank, the fifth in order and the next after the *freie herren*. At Ghent there were thirteen of these *schöffen* in the court of judges, thirteen in the council, and thirteen who had no official place. At Bruges there were thirteen lifelong ones, and the same number of councillors, that is, twelve of each, with a burgomaster of their number.

These town-officers or judges were often wealthy citizens who knew little of law; so that they needed advisers, the more if their office continued but a single year. Their advisers were called pensionaries from the pay given to them; and after the Roman law began to spread, were usually doctors or licentiates of law, who did not change with the change of the *schöffen*, but had a more permanent appointment. The same practice prevailed at the meetings of the estates of a province. Thus in Holland the grand pensionary was the paid officer or attorney of the estates; and in a town the pensionary was the attorney of the town judges or town council. Olden-Barnevelt was at first pensionary of Rotterdam (which office Grotius filled afterwards), and then grand pensionary: as such he would be present at the meetings of the estates

\* Comp. Grimm, *D. Rechtsalterth.*, p. 775, ed. 1; Dietz, *Etymol. Wört.* sub voce in part first. In the Germanic dialects it is *scepen*, old Saxon; *sceffeno*, old high Germ.; *schöffe*, *schöppe*, Germ.; *schoepe*, Dutch; *schepe*, Flem.; and in the Romanic: *scabino*, *schiafino*, *Ital.*; *esclavin*, *Span.*; *échevin*, *Fr.* For the institution of Charlemagne relating to *scabini* I have referred to Sohm, *Fränk. Reichs-u-Gerichts-verfass.*, § 18, in another place.

of Holland or of the states-general as the principal agent of the leading province.

One of the most beautiful instances of an institution that can be found in all history is the rise and progress of the English house of commons ; but as we have considered this in another place, it is needless to dwell on it here again.

We have seen that in the later stages of a country's progress, the founding of new institutions generally no longer exists, or, at least, is greatly abridged. But the benefits of institutions still continue, *one* of which is the steadfastness of political habits, which is the greatest of political blessings,—above all in times of revolution. *Another* is that the analogy of tried institutions furnished a norm for new ones of the same kind, but differently applied. *A third* is that an institution is something, if it be indeed national, on which the interests of a people can fasten. A country without them is like a land without mountains ; it is these that awaken a perpetual joy in the soul. Their general tendency is in favor of freedom, although they may become despotic institutions. But despotism generally dislikes institutions, because they have an independent existence, and thus resist arbitrary will.

### § 236.

*Local government and self-government.—Centralized and distributed powers.*

If the parts of a country or the parts of the world are to have any intercourse with one another, there must be differences of production corresponding with soil, climate, acquired skill, helps to industry, and differences in the distribution of a people over the surface of a country. There will be ports most accessible or safe, places most favorable for certain kinds of labor, or convenient as entrepots and markets. Where the soil and climate call to agriculture, only a few trades and operations besides that can find a support. Where ports or manufacturing towns or entrepots exist, and they are large enough,

many trades will find them the best places for their operations, and the facilities of living will increase as divisions of labor multiply. It is impossible for the manufacturer to be always near to the farmer, and the true interests of both are best consulted, when they can buy and sell in the cheapest market, and not when centres of business are artificially stimulated by protective tariffs.

Now all these places need some kind of political protection, but a township where there is a scattered population with at most a village or two, needs one kind of government, while a city with a compact population needs another. They both, however, agree in this that they have special wants of their own which are best known to the residents, while in other respects their interests cannot be separated from the interests of the general country.

The question now arises how can these civic or rural communities be best governed—by a control emanating from a central authority with no self-government on their part, or by a general law (or, it may be, a special charter), dependent on the legislative will of the country, yet conferring on them powers of local administration and legislation, within certain limits and under certain restrictions. This is a very great question, apart from the comparative advantages of the central and the local government, and in a free nation one of surpassing importance. For instance, in a large state belonging to our union there are some five hundred townships, besides a large number of villages and many cities. A bad government for all of these unfits the state as a whole to govern itself well; a bad government for a large city does more than this—it spreads a pestilential influence over all the surrounding country.

The instinct of a free people is to leave as much self-government to every part as is consistent with one law, one administration, one general supervision pervading the whole state; and in the local community to prevent officials from oppressing individuals, and all town authorities from neglecting their duties. The instinct of a

Government needed by cities and a scattered population.

Self-government of towns.



despotism is to dread any independent or partly independent control within its own limits; even if that be restricted locally and in its amount. The instinct of such a government, even when paternal, is to distrust the capacity of any smaller community to do anything for itself without first obtaining leave. If a country were left to itself, the towns would inevitably have some kind of law and administration of their own. But there would be a danger of a great splitting up of territory, which would, by its lawlessness, end in tyranny and centralization, or, by its want of common law and control, prevent perfect freedom of intercourse. This extreme, we must confess, would be worse than the other, which makes intercourse and life safe by the power of a common master. The early tyrannies were blessings to the world by uniting small communities, but is there not a more excellent way than either?

There is, we think, a more excellent way. It is to unite Union of local and general government. general government and local self-government in the due proportions and so that they shall not interfere with one another. But this balance between the powers of the state and of a city or town, a creature of the state, must be confessed to be as difficult, if not more difficult than that between the state and the confederation in a federal system.

### § 237.

Here it seems necessary before we proceed further to endeavor to make the proper distinctions between Central and distributed power. centralization and distribution of power. De Tocqueville, honored alike at home and with us, in his *Democracy in America*, makes two kinds of centralization; one in which the power controlling the *general* interests is centred in one place or in the same persons so as to constitute a *central government*; the other, the power which directs *partial or local interests* and proceeds from a *central administration*. If a *central government*, he continues, is united to *administrative centralization*, its powers thus acquired are immense. These two kinds of centralization must not be supposed to be insepa-

nable. The *government* of France under Louis XIV. was thoroughly central, yet the *administration* was much less central than it came to be after that time, and was when De Tocqueville wrote under Louis Philippe. In England, he adds, the centralization of government is carried to great perfection; and so far from supposing that the American governments are not sufficiently centralized, he undertakes to prove that they are too much so. "The legislative bodies daily encroach upon the authority of the government, and their tendency, like that of the French convention, is to appropriate it entirely to themselves." (i., 91.) If we understand this passage, it means the transfer of authority from one branch, the executive, to another, the legislative; which certainly may be an evil, and in some respects is admitted to be one in all the reformed constitutions, which limit the power of the legislatures. Yet, on the whole, the authority of the state governments, where one independent body administers, another interprets the laws, where all the officials are responsible, and can enforce what they claim to be the observance of the law only by trial before the courts in the last instance, is not excessive. The general government can be defended with less justice from the tendency towards centralization. In order, however, to compare governmental power in this country with the same power in countries where no federal system exists, must we not compare the sum total of attributes, both of the states and the general governments, with the powers of a simple one as of a united monarchy? If we so proceed, we shall not, I think, find them greater here than elsewhere in theory, and the constitutional checks are great as between the government of the state and that of the union.

To prevent the undue strength of the general government, there must be responsibility of every executive officer who advises and administers, down to the lowest functionary. If a case has been brought before the courts, it must serve as a precedent binding on all officials. The meanest person must be able to get justice, not by petition addressed to the head of the government, but by prosecution before an impartial

tribunal. There must be no absolute control over the army except in the field, no power of taxation vested in the government, nor of raising loans without the consent of the legislature. The checks which have been elaborated by the English race, not theoretically, but in the course of a long experience, are consistent (as M. De Tocqueville admits when he says that, "in England the centralization of government has been carried to a great perfection") with a vigorous and steady management of affairs, and they prevent many of the evils of which centralization is, if not the procuring, yet the helping cause.

We pass on to what the French have called "central administration," which may be defined the control of the central government, or the executive, over every interest, local as well as general, through a whole country, so that no individual or community may go out of a beaten track without being reined in by an agent of the central power. It is as if a parent could be ever present with his children so that they might do or say nothing for which they could not be rebuked at the moment, or for which leave must not at the time be asked. There must be no general rules which they are to follow or disobey at their own risk. Carried out in a nation, it would make government the only banker, road-builder, forwarder; as well as the overseer, by its agents, of all the interests in all the communities of a country. That thus all industrial as well as political freedom would run the risk of being extinguished, is apparent.

But it is with the management of local affairs that we are now concerned. Of this administrative centralization, M. de Tocqueville gives us a picture in his *Old Régime and the Révolution*, published not long after Louis Napoleon became emperor. It was no new acquisition of the revolution, but grew up out of the powers accumulated in the *royal council*, as the kings usurped the powers of the great feudal lords of the land. The council came to have, as the king's adviser, judicial, administrative, and even, in a certain sense, legislative powers in its hands; it levied and distributed taxes, it controlled other

administrative authorities, and could reverse the decisions of ordinary tribunals. Under this council the comptroller-general engrossed the management of all money-affairs, acting alternately as "minister of finance, of the interior, of public works and of commerce." The government of the provinces came into the hands of intendants, although some of the great nobles, as provincial governors, enjoyed the honor of governing without the power. The intendants were generally members of the royal council of inferior position; they held administrative and judicial power, yet with right of appeal from their decisions; they levied all the taxes except those that were not farmed out by the council, regulated the system of militia, and to a great extent, the public works, roads and bridges, secured peace in the provinces with the help of a mounted police, aided in the support of the poor, and so on, subject in everything to the control of the council. There were many seeming exceptions to this sway, yet even the courts could not retain any freedom. "It is hardly possible," says De Tocqueville, "to mention a branch of social economy or political organization, which had not been remodelled by orders of council during the last forty years of the old régime" (chap. ii., end). In the cities municipal liberty outlived feudalism, so that "long after the seigniors had ceased to administer the government of the rural districts, the cities retained the right of self-government;" but after 1692 the kings sold the places of magistrates in the towns for the purpose of raising money—a plan pursued with other posts also, such as those in the courts of justice. During eighty years the towns purchased back the right of electing their magistrates "seven times," and seven times was the right taken away, as soon as they had learned to appreciate its value. "In the eighteenth century municipal government had degenerated into oligarchy. A few families controlled the public affairs in favor of private interests without the knowledge of, or any responsibility to, the public." But these municipal authorities were themselves interfered with by the council, which not only modified the city govern-



ments from time to time, but on advice of the intendants, sanctioned special laws, often without knowledge of the people (chap. iii.). One of the most striking features of city administration "in the eighteenth century is, not the absence of all representation and intervention of the public in city business, but the extreme variability of the rules governing such administration. Civic rights were constantly bestowed, taken away, restored, increased, modified in a thousand ways and unceasingly. No better indication of the contempt into which all local liberties had fallen can be found than these continual changes of laws, which no one seemed to notice. This mobility would alone have sufficed to destroy all initiative or recuperative energy, and all local patriotism in the institution which is best adapted to it. It helped to prepare the great work of destruction, which was to be effected by the revolution." (Note to chap. iii., p. 66, of the Amer. transl.)

No better example could be given of the evil of meddling with municipal liberties by a despotical government, and of doing this without rule or general system, just as the cities at their origin in the middle ages had acquired their liberties, each for itself without rule or general system.

### § 238.

The subject thus far, in its relations to local government, has borne both upon the government of cities and of places chiefly agricultural, where the population is for the most part scattered. We shall in a word or two consider the advantages of investing these with the privilege of self-government, and then treat of the two, each by itself.

The great advantage is that it trains up a people for the exercise of its political rights, in all parts of a country, so that, if there were a perfect general or central government possible, some participation of each city or township in local affairs would still be desirable. To grant political rights, as the suffrage, and restrict them to occasions where the individual judgment has no experience or knowledge to guide it,

is a questionable benefit. If it should be said that ignorance or inexperience may be a cause of great harm, even within the small sphere of local affairs, the ready answer is that the possibility is even greater in family affairs. Would you put the community under tutelage to the public lest it should make mistakes, you ought to do the same in all similar cases. The community must be made wise by mistakes. It has no need to be invested with powers that might ruin its future prosperity, as for instance with that of unlimited self-taxation ; but, if empowered to do what its local needs require, its inhabitants will grow in reflection, in intelligence, even touching their own private affairs, and in a sense of responsibility.

Again, the people of each community have special wants which are better known to themselves than they could be to some guardian chosen for them by the public. Indeed, it would be altogether likely, if this mode of administration were pursued, that the guardian would follow the advice of some of the principal inhabitants, and that this would cause a greater dissatisfaction than any decision made by the body acting freely.

The same plan of self-government excites what we called public or common spirit in a far greater degree than could be done if the smaller communities were merely passive. Patriotism is a complicated feeling, which is due in part to men's identifying themselves with their country by a participation in its affairs. The aid of the feelings kindled by local self-government is especially needed in an age when news circulates everywhere, when men can think and criticise. He who, in such an age, under a system of centralization, would grumble at the government, would, in a community which manages its own local affairs, complain of the other party.

The importance of self-government for a *rural population* did not at once force itself upon the minds of reflecting men, because the country people belonged, mostly as serfs, to the lordship or manor, and the habits of unreasoning obedience were enforced by church and state. All this is changed, or is in a process of change in all Christian lands, so that the old

methods of securing obedience to a superior's will are failing to secure their ends. Meantime, the other plan, it is found, has raised up a class of small land-owners, who are the best protection of a country in danger, defending it as much as it defends them ; who may be relied upon for paying taxes and bearing public burdens, who expend far more in educating children and in comforts than an equally large community of tenants would, or of farm laborers ; who feel the stimulus of the possibility to raise their families in the world, which would be wanting to hereditary tenants. It would be impossible, when once such a population had managed its own affairs, to take this power away without struggles certain either to destroy the central power or to insure future despotism.

Some of these considerations apply to cities as well as to rural communities. There are others which are peculiar to the former. The cities, being centres of industry and capital, need special and greater protection against internal evils ; they understand their own wants, but, owing to a diversity of classes and to causes growing out of a compact population, find self-government harder in proportion to their size and compactness. The lower classes in cities have in general a much less permanent abode than in country communities, and are open to many evil influences. In free states, if not in all states, the virtues and the vices of society are seen in cities in their extremes ; the dread of the frowns of men is not felt by the vicious, where every one is unknown to most of those whom he meets and can find companions to his liking. It is evident that a more efficient nocturnal, sanitary and detective police is needed in cities than elsewhere ; that a fire department is there a great interest ; that drainage, paving of streets and of sidewalks, laws in regard to contiguous buildings, to markets, garbage, and the like, have their home in cities, while in rural districts such things are of far less importance. Without going further into the subject, we are prepared already to say that the circle of duties which a city is called to do, in order to perform its appropriate part to the inhabitants and to the state, is very much greater than that of the rural

township. Can a government, depending on the state and not on the voice of the town, discharge these duties? Can it act as a representative of civic interests? It would seem at once that we must say no; and the only point of doubt is whether, under defective city charters, there can be more misgovernment when affairs are managed by an administration depending on the central power or on one elected by the citizens.

### § 239.

Passing on now to speak first of cities by themselves, we lay it down (I) that one general law ought to regulate the city governments in a state, and that no special regulations ought to be permitted, except by way of punishment, or on representation of a vast majority of the citizens.\* In most of the countries of Europe such a general law might be difficult of introduction, because forms of administration were given to the cities in the middle ages, which have remained in substance in many of them until the present time. But we object in such a country as this to the framing of a separate charter for each new place as it becomes an important business centre. Let it be competent for the inhabitants, on reaching a certain population—say of ten or fifteen thousand souls—to take the steps laid down in a general law, to have the city limits fixed, for instance, by the authorities of the county, by those of the town out of which it is to be taken, and by a deputation from the projected city. Let it then come, as a city, under the operations of the general law,

\* The new constitution of Illinois (1870) prohibits local or special laws "incorporating cities, towns or villages, or changing or amending the charter of any town, city, or village," or "providing for the election of members of the board of supervisors in townships, incorporated towns, or villages." The new constitution of Pennsylvania (1873), in a similar spirit forbids the general assembly to regulate the affairs of counties, cities, townships, wards, boroughs, or school districts; or to incorporate cities, towns, or villages, or change their charters, or to change township lines, borough limits, or school districts by local or special laws. Comp., however, Art. viii., Sec. 11.



subject to all the duties and having all the rights of communities known to the law as such. If it fails grossly to fulfil its office, let the legislature, or the courts, on presentation of the case, have power to disfranchise it, or in some way restrict the exercise of its original powers. Occasions may arise when the powers of action granted in the general charter are insufficient to meet the wants of the city. In that case a special enabling act would be required to do the work in question and raise the sum needed. This supposes that the city is to undertake a work itself, which for certain kinds of wants, as a great system of drainage or of introducing water, might be found advisable. Or if the work be such that companies could be formed by individuals, as in the case of street-railroads, gas-works, or water-supply, and the city did not wish to do this at its own cost, by its consent and at its request such a work could be committed to private hands. In all cases where a heavy outlay and somewhat uncertain return are in prospect, it is far the best plan that either a large majority of the capital to be taxed should give its consent, or a still larger portion of the inhabitants; or at least, if any considerable amount of capital should be against it, the higher authorities of the state should give their ultimate decision. By no means ought municipal governments, as they are now constituted and elected, to have a speedy, unchecked, and ultimate action, where expenses for public buildings or for other improvements or works of art are to be incurred by the taxpayers. The latter ought to have a right to obstruct such things, until it can be made to appear that their opposition is unreasonable.

2. In regard to the government of cities, we meet with difficulties which it would be out of place to discuss here. It is enough to say that these arise from the want of a responsible head ; from carelessness in management, by which embezzlement of city funds is made easy or is easily hidden for a time ; by bringing party considerations into the choice of all elected officers, and by universal suffrage. Our large cities are the hotbeds where caucuses man-

Difficulties in city-government.

aged by obscure politicians, private bargains of office-seekers, devices for the purchase, at great expense, of things needed for public buildings, erection of public buildings by dishonest contract, and all sorts of base jobs flourish. Why is this so? It seems to be so partly, because so many who vote are not taxpayers in the city and are led by others: partly because there is not sufficient control lodged in the mayor's or other chief officer's hands. If he is made responsible, some of the evil would be done away. If, where taxes are voted, as in the boards of a council, capital could have its just influence, much corruption would come to an end. In regard to the election of city governors, it may be said that they all ought to be chosen by the city itself. For the state to appoint the mayor is as much against the true principle as for a king of France to make the same appointment. The evil, which such a plan of taking elections out of the hands of the community is intended to remove, is party elections, and election by those who have nothing to lose by a choice of unprincipled men. But an election by the state legislature, or an appointment by the governor, would be controlled by party interests, like one by the city itself. As for election by universal suffrage, for this there is no cure except by restricting suffrage in civic affairs to the taxpayers, which is more desirable than attainable. But something would be gained if a certain amount of capital, by making objections to a tax, could in some way cause it to be more maturely considered. As it is, we fear that larger capitalists prefer their own quiet; they pay what is assessed upon them without complaint, or live in the country, or manage to have their property not taxed at all, or at a low rate.

3. The power or competence of an incorporated city need not be spoken of at large. It may be said negatively that it ought not to have power to do anything which is not justly deducible from the purposes for which it has been incorporated. The power of taxation must belong to all self-governing communities, but it is too great a

Amount of power  
to be given to cities.

power not to be controlled. And when we say this, we include that of borrowing money for municipal purposes ; that is, of throwing debts upon the town on the plea that it will by and by be greatly benefited and enriched by an outlay. On such pleas canals and railroads have been aided to a great extent in this country, not only by cities but by counties also, until unnecessary and useless debts yielding no adequate return have gone beyond the power of the place to pay, or have been a lasting injury to its growth. The remedy for this lies not in cutting off from the municipalities the power of laying taxes or of borrowing, still less in making this power dependent on the will of the legislature ; but in limiting by a general charter the exercise of such powers. Care for the next generation, and present pecuniary safety, as well as honor, require some such provision as the new constitutions of some of the United States have adopted under the sobering lessons of experience. Thus the constitution of Illinois (1870) declares that "no county, city, township, school district, or other municipal corporation" shall contract a debt besides that already existing, exceeding five per centum on the last assessed value of the taxable property within its limits. The recent constitution of Pennsylvania contains provisions the same in their general principle. But this is not enough. It ought to be placed within the reach of the payers of taxes on property situated in the town to control such projects, which may be mere jobs or devised for present political purposes. The simplest control would be to give them alone the right to vote, where taxes are to be levied. This seems to be the only way within the reach of our institutions in the United States, of securing municipalities against financial folly, or even ruin; since all must vote for town officers, and party controls to so great a degree in local affairs. A short time since, in a city of moderate size, a gathering of workingmen demanded that the corporation of the place should appropriate a quarter of a million of dollars in order to furnish work for the unemployed. A city ought to be unable to do such things, for the habit will grow, if

allowed, until as at Athens, the incomes of the rich are almost held to be public property, to be used for the pleasures of the community.

In saying this, I do not wish to be understood as relying on the large taxpayers principally, or even as much as on those whose incomes support them by the help of economy. The very rich are little concerned in town affairs, too little in public affairs, so that if they were disfranchised, it would work no great harm to them or to others. I have heard the remark made by one who had himself served in town councils, that aldermen of very moderate means were more inclined to curtail tax-bills than any other members. The reason is that they themselves feel any unnecessary expenditure, and they know what men possessed of similar properties can bear.

That a control of a legislature over a city budget is not enough of a security against waste or fraud, is strikingly shown by the instance of New York, where the state can and does alter the charter of a city at will, and where the actual debt,—a part of it incurred by gross fraud, a part by paying much more for work or constructions than was needed,—is so large that a moderate increase must cripple the interests of business to a great extent, if not drive it to other quarters.

4. The elections should be in the hands of all who can Who ought to vote in city elections. vote for state elections, but a question of some importance is whether inferior judicial officers, like those who are called "police justices," and the police itself, ought to be in any way under the control of the popular vote. There are strong and evident reasons why the appointment of police officers should be in the hands of the mayor, subject possibly to rejection by the town council. Those officers, again, who hold police courts, if chosen by common vote, will be men of most profound ignorance respecting law, who have no character to lose, who have been employed in the mean occupation of ward politicians, whose acquaintances or political friends are likely to appear before



them on trial.\* As for the police itself, to make it possible for the dangerous classes in a city to choose, or indirectly control the choice of those whose work it is to ferret them out, and bring them to justice, seems so absurd that it can hardly meet with favor except from rogues and demagogues.

Still more important is the question whether all the citizens ought to be allowed to vote on, or indirectly through their representatives in town councils, to influence the raising of taxes. If our principle is correct, that none who do not own property should vote for representatives who lay taxes on property, the mass of city proletariats ought to be excluded from the polls where tax-levying councilmen or officers are elected. That for some reason or other our present system is exceedingly bad, the experience of New York will prove. In 1850 the population of that city was a little over half a million, the tax levy somewhat over three millions, the estimate of taxable property, 286 millions, the tax-rate 1.13 per cent. and the debt over twelve millions. In 1877 the debt had arisen to 113 millions, the tax levy to twenty-eight millions, and the rate to 2.67 per cent. "The increase in the annual expenditure since 1850, as compared with the increased population, is more than four hundred per cent., and as compared with the increase of taxable property, more than two hundred."† The causes of this alarming state of things, which, if not checked, must end in the ruin of the city, is attributed by the commission referred to in the note, to incompetent and unfaithful governing boards and officers, to the introduction of state and national politics into municipal affairs, and to the assumption, by the legislature of the state,

\* See "Our Police Courts," a pamphlet published by Mr. Dorman B. Eaton, and especially his speech there found (pp. 16-36), before the judiciary committee of the New York Assembly, in 1873. Mr. Eaton has done more than almost all other men in this country in making public, and trying to remedy, municipal abuses. He deserves the thanks of all.

† See the report of the commission to devise a plan for the government of cities in the State of New York (March 6, 1877). This report I received after finishing the present work.

of the direct control of local affairs. The remedies which they recommend are principally these: the appointment of a chief executive officer having general supervision, with the power to appoint other principal executive officers, except the chief financial and law officers; and of a board of finance elected by tax and rent payers, with such powers only as relate to taxation, expenditure, and debt. They are to determine the amount of annual expenditure and to appropriate it to its various objects and purposes. The board of aldermen are to have nothing to do with these financial duties. It is proposed also that no money shall be borrowed or debt incurred except under certain specified conditions not likely often to arise.

These or better recommendations must be adopted, or, in the long run, well-governed communities will take the start of ill-governed. New York, for instance, will decline by an inevitable law of retribution.—It is only the immense importance of the subject that leads us in a work like this into these details.

5. The election of mayors is of especial importance. Shall it be in the hands of the central government, or of the town councils, or of the people? The French are now seeking to cut the connection between the mayor and the government, by committing the choice of this magistrate to the town councils (1876). Hitherto there has been a great fluctuation in the system, but by existing law mayors are appointed by the sovereign in every chef-lieu of departments, arrondissements and cantons, and by the prefect of a department in all smaller communes. Certain officials are incapable of serving in this capacity while they hold another office. The mayors and their adjuncts receive no salary, are removable by the sovereign, and may be suspended by the prefect for a short period, which the central government may extend. He has duties as representative of the government, and others as head of the commune, which cannot here be noticed, except that it belongs to him to present the budget of the commune to the council. All the communes of

France are subject to one and the same law, except Paris, where the prefect of the Seine acts as head-mayor, and every one of the twenty *arrondissements* into which the city is divided has a separate mayor of its own. The police is managed by a special prefect, and the unity of the city is represented by a common council of eighty members, chosen one from each of the four quarters into which the arrondissements are divided. The government of Lyons also is formed after a model nearly similar to that of Paris.\*

In England, after the reform bill of 1832, and especially by the municipal reform act of 1835, great changes took place in the government of the boroughs, where various abuses had reigned unchecked for several centuries. These boroughs were chiefly under the control of town councils "usually elected for life, and conducting their proceedings with closed doors," and in their almost entire freedom from responsibility, using their offices as means for obtaining trade privileges and as ministering to parliamentary corruption. By the act of 1835, town governments are in the hands of a mayor, aldermen and councillors, *i. e.*, of a town council. The councillors are chosen by the burgesses; they must be burgesses themselves, must occupy ratable property, varying with the size of the borough, and they hold office for three years. The aldermen are elected by the councillors, and hold their office for six years, one-half of their number retiring every third year; "and since they can vote for their successors, it is found in practice that a party which is strong enough to return a large majority of aldermen is not easily dislodged from its supremacy in the town council." The mayor is chosen by and from the council every year. The act of 1835 vested no magisterial jurisdiction in the councils of boroughs, except that the mayor and ex-mayor are *ex officio* justices of peace; and all local justice is administered by magistrates appointed by the crown, especially by a magistrate paid by

\* Count de Franqueville in Cobden Club Essays, 1875.

the borough (if there should be one in the place), called a recorder.\*

In this country of universal suffrage, experience has taught us the need of warding against evils arising from certain plans of appointing municipal judges. I should trust as little to a mayor chosen by the board or boards that have the administration over our cities, as I should to the legislature; which seems to me to be incapable of judging and as likely to be influenced by party considerations as the voters in the municipalities themselves. The choice by town boards has some advantages, only the mayor ought not to be selected from their own number. And there is great danger lest the mayor, if so elected, should make corrupt bargains with those who choose him. On the whole, if the mayor is *ex officio* to have very considerable power of appointment, or even of nomination, and if one of his chief functions is to exercise supervision and control over the city councils, it would seem best to elect him in such a way that the councils shall have no control over the election.

6. The choice of executive officers below the mayor may be made by that officer, or by a council, or by popular suffrage. Mr. J. S. Mill (Repres. Govt., chap. xv., p. 298, Amer. ed.) thinks that such persons should be nominated and not elected. "It is ridiculous," says he, "that a surveyor or a health officer, or even a collector of rates, should be appointed by popular suffrage. The popular choice usually depends on interest with a few local leaders, who, as they are not supposed to make the appointment, are not responsible for it, or on appeal to sympathy. . . . If, in cases of this description, election by the population is a farce, appointment by the local representative body is little more objectionable. Such bodies have a perpetual tendency to become joint-stock associations for carrying into effect the private jobs of their various members. Appointments should be made on the individual responsibility

\* I am indebted for these particulars to, and sometimes use the words of, the Hon. G. C. Brodrick, in Cobden Club Essays, u. s. 1875, 1-95.



of the chairman of the body; let him be called mayor, chairman of the quarter sessions, or by whatever other title. He occupies in the locality a position analogous to that of the prime minister in the state, and under a well organized system the appointment and watching of the local officers would be the most important part of his duty; he himself [on the English plan] being appointed by the council from its own number, subject either to annual re-election or to removal by a vote of the body." Agreeing with these views in general, we have only to ask whether election by the people ought to create a mayor less or more likely to make faithful appointments than one chosen by a council out of their number. As far as I can see, such a man would make bargains with his colleagues on condition of being elected, and each of these would have his hangers-on to be provided with city offices; while a mayor chosen by direct vote of the community would be less open to such influences. But such direct election is far from being satisfactory.

#### § 240.

7. The questions touching the government of scattered, especially rural communities, are much less difficult of solution than those relating to cities and boroughs. There, every man who would be put forward for election as a "selectman" or a "supervisor," or on the various school or other boards, is known through the township; the duties are discharged for a small salary or gratuitously; the spirit of the place demands economy in all outlays; there are generally no large funds to be kept or embezzled; it is a matter of prime interest that taxes shall be brought down to as low a point as possible; the police, the school arrangements, provision for the poor, for roads and bridges, are on a settled system; so that the town goes on from year to year with little change. In consequence of this, the habits of an agricultural town are conservative, often to an extreme. It ought to be that such a community is far more competent to manage its affairs than a municipality is;

and it is plain that self-government here, as an education for political duties, is of great importance, as being the principal, if not the only accessible initiation into the mystery of self-government.

A general law for town administration is easier to be framed than for cities with varying and vast interests. It seems to be of no very great importance whether a mayor (an officer not known in such places on this side of the Atlantic, we believe), or a first selectman, or some other officer, shall be at the head of affairs. The officers of various kinds may be chosen annually, or it would be better if a portion should remain in office and a portion be removed annually. The power to incur debts above a certain percentage of the property might be restricted, as in the case of cities. The great dangers of country towns in the United States consist in their being remote from public opinion outside of their own community, from the influences which help on progress, and in a certain powerlessness against evils that creep into their territory. As a part of the body politic they are not able to find representatives, in all cases, who are equal to the discharge of necessary duties; and their use consists in opposition to unnecessary outlays, rather than in active promotion of the public interests.

What has been already said of the officers of cities in regard to the evil of having them appointed by the central power, will apply with more reason to rural divisions of the country. In the city the mayor may prove, from his incompetence or corrupt character, a dangerous man, if chosen on the rule of universal suffrage; in the country town the head men can do little harm, if so chosen; while on the other hand they will be mere tools of the government if the town has no voice in their election.

In the New England colonies there was a necessity for self-government, owing to the circumstances of their first plantation; and their church constitution led them to free elections in the community. It is generally supposed also that they carried with them, as a legacy from

New England  
township system.

Anglo-Saxon times, that system of free self-government which became obsolete, or nearly so, not long after the reformation. This is probably true, for, although the manor and its court swallowed up the business of the English township in part, still it held its assemblies or *gemots*, passed by-laws, elected certain officers, had certain police duties laid upon it, and prepared the tithing lists for the sheriff's inspection. The parish and town being nearly confounded in the course of time, in the vestry meeting, "the freemen of the township, the rate-payers, still assemble for purposes of local interest not involved in the manorial jurisdiction; elect the parish officers—properly, the township officers, for there is no primary connection between the maintenance of roads and collection of taxes and the parish as an ecclesiastical unity—the church wardens, the way wardens, the assessors, and the overseers of the poor."\* It is worthy of notice that under the ecclesiastical constitution of two of the New England colonies the parish and town were one and the same for the most part, that the division of towns into two parishes needed an order of the "general court," and that the church and parish elected their minister by concurrent vote.†

The competence of the towns is thus described in the laws of one of the New England states.‡ Towns may make such regulations for their welfare not concerning matters of a criminal nature, nor repugnant to the laws of the state, as they deem expedient, and enforce them by penalties not exceeding five dollars for one breach. The principal powers are those of establishing poor-houses, workhouses, high schools, consolidated school districts, setting up and maintaining by a tax of fifty cents on every poll, public libraries, passing by-laws respecting sidewalks, catching birds, fisheries, registration of births, marriages, and deaths, and making town burying-grounds. Their necessary duties are to support free schools, maintain paupers, build and keep in repair highways, and set

\* Prof. Stubbs, Const. Hist., 1, § 43.

† See Buck, Eccles. Law of Massachusetts, chapters 1-3.

‡ Laws of Connecticut, revision of 1874, title 7, ch. 2.

up sign-posts. The leading town officers are select men from two to seven in number, of whom the person first named on a plurality of ballots is the "first selectman;" with whom are chosen constables, assessors, a board of relief to whom appeal is made from the assessors' lists, a town clerk, a registrar of births, etc., a treasurer, a collector, a surveyor of highways, and various inferior officers, as weighers, gaugers, having to do with police.\*

The New York system of supervisors, which has spread over several other states that lie farther westward, gives much more efficiency to the county than is given by the systems in New England. The towns have their appropriate officers, and there are school commissioners in the school districts under the control of the superintendent of public instruction. Among the officials chosen by the towns is a supervisor, who receives and pays over town moneys, keeps accounts, reports the town debt, and is one of the auditors of the town treasurer. The supervisors of the county form a board, which, by a majority of the whole number, exercise extensive powers. Some of these powers are to control the corporate property of the county; to examine and settle its accounts and direct the raising of money to pay the same; to repair county buildings and buy real estate for the sites of new buildings; to sell county estate; to raise by tax a sum not exceeding five thousand dollars a year for buildings which the law permits them to build; to borrow money for the use of the county; and authorize any town to borrow not more than four thousand dollars; to erect new towns and divide old ones; to make laws and regulations concerning wild beasts, dogs, thistles, etc., and protect game and fish, etc. They audit the accounts of superintendents of

\* For a long time city government was unknown in New England. Boston was governed by selectmen until 1822. In Connecticut, cities were of somewhat earlier date. But the plan which exists more or less of dividing up work within certain limits between city and town officers is due rather to the force of habit, and attachment to what is old than to the intrinsic advantages of such a system.



the poor, are charged with the care of county records, and can legalize acts of town meetings that are informally called together.

The townships and parishes of England have by no means that significance which they might have for the well-being of the country population, and this grows in part out of the decay of the old yeomanry, and the accumulation of land in a few hands. To the counties has always belonged the management of bridges; and the parishes formerly were obligated to repair all public roads, bridle-paths, and foot-paths. By legislation within this century the superintendence of highways is committed to mixed boards, consisting partly of resident justices and partly of way-wardens elected by the parishes; and for this purpose the counties were divided into highway districts. The very important office of administering the poor-laws is entrusted to boards of guardians, consisting in part of owners of property, and payers of rates in the parishes which make up the various unions. A health act passed as late as 1872 imposes the obligations created by the sanitary act of 1868 and others on boards, which, in rural districts, are no other than those of guardians of the poor. Finally, the education act of 1870 gives an independence to rural parishes by making each a school district "responsible for all the school accommodation of all its children within the school age." \* Thus, with this exception, all the late legislation of England shows that the parish or township is of small account in the local administration; and this exception is evidently necessary, as children must go to school within the parish, or not at all.

We have seen that in France the communes, whether great or small, rural or urban—with two exceptions—Government of communes in Belgium.—are governed on one system. In Belgium, by laws of 1836 and 1842, the communal authorities are a council, and a body composed of a burgomaster and *schepens* or *échevins*,—sheriffs as M. Laveleye now translates these ancient

\* Brodrick, u. s., 36-44.

words. The councils of the communes vary in number between seven and twenty-one, who have a residence in the territory of the commune itself, except that in very small places a part of the members may be supplied from another commune. They are chosen for six years by electors paying direct taxes to the amount of at least ten francs. Half the council goes out every three years. The *échevins* or *schepen*, as well as the burgomaster, are named by the king from among the councillors, and hold their offices for six years, but may be displaced or suspended by the state authorities. The councils manage the property and revenues of communes; regulate and pay their expenses; see to the police, especially in regard to health and public security; administer the public establishments of the communes, attend to public works and lay local taxes, subject, however, to the royal approval. The *échevins*, who with the burgomasters are salaried officers, take care of the communal property and the archives; make known the resolutions of the council and execute them; keep registers of births and deaths; attend to suits in which the commune is concerned; and supervise the servants of the commune, hospitals, and theatres. The burgomaster is head of the police and administers local justice, subject of course to appeal, *i.e.*, he has charge over breaches of the law and crimes committed within the limits of the commune. It will be seen from this brief sketch, which we give on M. Laveleye's authority, that the state has too great control over the executive officers of the communes.\*

In Spain the municipal officers are *alcaldes* or mayors, deputy mayors, in number equal to the districts of the town, and councillors (*concejales*). Certain members who represent the town at law are called *syndics*. The councillors are elected, one-half of them every two years, in districts, and the *alcalde* is chosen by the board of councillors. Their functions include police, care of revenues, sanction of expenditures, supervision of institutions of benev-

Municipal regulations in Spain.

\* Laveleye in the Cobden Club Essays, u. s., 256-264.

olence and education. They can pass by-laws and impose fines. But the law declares the municipal officers to be delegates of the central government, and requires them to aid the officials of government in the discharge of their duties,—which is certainly a very dangerous relation for the freedom of the towns. A singular appendage or check on this town government is a *junta municipal*, composed of the councillors and of citizens three times their number, taken from the rate-payers, which was created in 1870–71, and was intended to guard the wealthy class in the towns from oppression. The local taxation is not equal to the needs, and in the late troubles of Spain this has prevented the immediate success of self-governing institutions.\*

The *landgemeinde* or rural commune, in Prussia, has properly nothing to do with the school, the church, or the police. Its principal business seems to be the care of the poor. Its administration of affairs is in the hands either of a body elected by the community, or of the community meeting as an assembly. Its officers are a *schultze* and two or more *schöffen*, who have police duties and can perform certain notarial acts in connection with a village court. The country communes were formerly connected in great part with an adjoining manor (a *gutsherrschaft*), and the lord was responsible for the police. The country commune, under the inspection of superior authorities, has the power of providing for its expenses by rates levied for that purpose.† These are most imperfect and defective forms of self-governing communities. It is to be hoped that a wholly new system will force its way into Prussia ere long.

The Russian village community—called the *mir*—is a truly patriarchal one, based on community of land, and descent from a common ancestor. In its assemblies, consisting of heads of families (women included), it decides upon redistribution of the common land,—the system of private landownership being only an exception—divi-

Prussian system.

Russian village communities.

\* Moret y Prendergast, in the essays before cited, p. 347 and onw.

† Morier, in the essays above cited, pp. 426–430.

sion of taxes among the members of the *mir*, who are jointly responsible for the debts of the separate members ; granting of passports to its members ; discharging old members and receiving new ones ; and judging in small civil and criminal cases. Formerly recruiting, or furnishing soldiers to government, was also one of the duties. The meetings of the assembly, that is, of the inhabitants, are informally called by the elder or *starosta*, as the people are leaving church ; and are held frequently *sub dio*, and often in the neighborhood of a tavern. When there has been talk enough, the question is not put and decided by a majority, but if there appears to be a difference of opinion they adjourn, and do this more than once, until the minority withdraw, or some compromise is effected. When there are candidates for some office, the names are talked over before the meeting begins ; and when a name is mentioned, the meeting shows its feeling in a few words and come to a decision. The community has a good deal of power over its members, but this is exercised rarely except for the purpose of compelling them to pay their share of the taxes.\*

I have said and need say nothing respecting self-governing divisions greater than towns, since in the matter of local and self-government they have but a subordinate interest. The county brings justice near to the people, who otherwise would be oppressed by its expensiveness ; and it is convenient for some purposes of administration, but is of little use in calling forth and keeping up the self-governing capacity of the people. In the southern States of our Union the system of slavery required that plantations should be larger than they would be in communities composed of freemen only, and there was no centre of population except the county-seat. This prevented common schools, and rendered joint action difficult except for communities spread over a district of considerable size. In some of these states,

\* Ashton W. Dilke, in *Essays*, u. s., 314-317. I have in some places made use of his words. Comp. Laveleye, *de la propriété*, chap. iii.



the division by townships has been introduced. In one of the northern states,—Illinois,—the southern portions have had a system of counties as their units of administration; but the northern portions have townships for their units, corresponding to the origin of the early settlers; but now the township system is invading the soil of the other portions.

Mr. J. S. Mill thinks that “the plan of representative sub-parliaments for local affairs,” in England, “must henceforth be considered as one of the fundamental institutions of free government.” If by these words are intended the boards of guardians of the poor, of managers of highways, boards of health and school committees, such institutions may be very efficient means of administration, and may call forth great executive vigor over a country. But a despotic government might create and sustain by law such unions, if it was enlightened enough. I cannot see how such neat and efficient modes of local administration are going to be great political blessings. If the land is held by few hands, and all agriculturists are tenants or farm laborers, they will not, we may assume, be members of such sub-parliaments. The hope of a country depends mainly on small land-owners. A country without these is in danger of running into practical despotism. Where the mass of the people, by reason of their poverty or exclusion from places of influence is only passive, there is little self-government or political education.

## CHAPTER XI.

### SUBJECT-MATTER OF LAW AND ADMINISTRATION.

#### § 241.

IN the second part of this treatise we arranged under several heads the ends for which the state is Subjects here treated of. necessary. The conclusion was reached, that,—in addition to the protection of rights and obligations, the general defence against foreign foes and the maintenance of public order,—there are certain departments of work which the state may take upon itself, either exclusively or in concurrence with individuals or associations. These kinds of work may be neglected by the state while yet it performs its most important functions. It may even appear best that a state should have no direct concern with one or another of them, but should leave them to voluntary efforts, only superintending and controlling such efforts, so as to keep them within the limits of justice and public benefit. To some of these we now invite the attention of our readers, intending to make but few remarks on most of them, as requiring no long exposition to disclose their relations to the state, but only practical rules which experience in public business will suggest. Others of them will demand a more extended discussion. The subjects are safety against foreign foes and preservation of order within the state; public health, roads, taxation, protection of industry, the relations of the state to education, to the poor and infirm, to morals and to religion.

#### § 242.

I. The United States are so remote from any foes that can be dreaded that the maintenance of an army is a minor interest. In the late war of secession Safety against foreign foes.

one of the strongest motives for keeping the union entire was the fear of future wars with another republic, the fugitives from which would be continually crossing the border, and with which, for various reasons, we could not long expect to be at peace. The insulation of Great Britain removes it to a distance, if not *toto orbe*, from the rest of Europe; and this has had a great influence on her steady development. Most of the nations of Europe have been affected not only in their general prosperity but in their forms and functions of government, by the necessity of going to war with each other; and the balance of power, so far from provoking war, has rather on the whole kept down the aggressive spirit and saved smaller states from being absorbed in larger ones. Their nearness and the suspicions of the designs of larger states call for large armies; large armies call for increased burdens on industry; and the increase of the military force of one country calls for the same increase in all others which are exposed to its invasions or intrigues. The war spirit does not generally spring from the people—although Napoleon's conquests finally roused all Europe, rulers and people, against the French—but from dynastic quarrels and from intrigues. The ease with which money may be borrowed in large sums in the leading money markets adds to the willingness with which nations go to war. Posterity must pay the debt.

There is no end to this which is likely to be accepted by the civilized nations of the world; but every step by which the tax-payers gain political power makes war more difficult. If the power of borrowing could be constitutionally restricted and the power of lending for purposes of war be made difficult, this would be a blessing to the world. But a still more important measure would it be, if nations by treaty reduced their public armaments—on land at least, for fleets are less dangerous—according to a uniform rule. Perhaps the same end may be gained by a loss of public credit amounting almost to bankruptcy.

## § 243.

II. A nation needs armed forces against seditions and insurrections; but the question of public order depends mainly on a well-devised system of police. Safety and order within a state. In another place we have restricted this term to the English use instead of allowing it to embrace all that care of the public welfare which is not included in the military, financial, and judicial departments of administrative power. It is with us the means, subordinate to other powers, of protecting the persons and property of individuals against injury, especially arising from evil-doers, but, in part also from natural agents; and of detecting the authors of such injuries in order to bring them to justice. A detective police—it has appeared—cannot properly be separated from a defensive; for the two functions, as they deal with the same classes and same individuals, are best lodged in the hands of the same policeman or of men belonging to the same corps. It is idle to follow theory, and say that as one is related to the judicial organs of society (namely the detective) and the other not, they ought to be committed to different persons. In regard to the proper constitution and connections of the police of society, there is much about which we feel that we are at a loss. The following remarks may serve to show the extent of the police power, the responsibilities under which it should be exercised, its connections within itself, the mode of its appointment, and the divisions of which it is susceptible.

1. A question of a preliminary nature is whether the care of public order and safety ought to be made a distinct department from the care of public health. Indeed, might not public charity, the care of the poor, be confided to the same great board with the two others mentioned? There is a reason for separating public charity and health from public order, which seems sufficient in large places to prevent their being united in one. The care of health needs the highest medical science, and public charity is closely connected with it; for the habits and houses of the degraded poor are sources of infection on



which medical guardians ought ever to have their eyes. Where the community is small all may be grouped together, but in large cities they can perhaps better act apart, and yet be so connected as to be enabled to play into each other's hands. I would then have public order entrusted by itself to a set of men who are only prepared to put down and resist force, or to combat with the destructive powers of nature. Making these limits, we come to subdivisions of the police power properly so called, according as the harmful agencies to be met proceed from evil men or from the element of fire. A fire department has a distinct work of its own not needing the action of individual men, but the combined strength and skill of a number engaged in the very simple work of extinguishing flames. A night police, on the other hand, has a number of very delicate duties confided to it, besides that of giving the alarm when fires break out. The men on duty are called to detain and arrest suspicious persons, to visit drinking and gambling houses, it may be, to put a stop to nocturnal brawls, to repress noise, to take up vagrants, with various other duties, some of which require the exercise of considerable firmness and discretion. They are often called to defend themselves or to attack a superior force of vagabonds. Courage and strength of resolution must be put forth, if they would act their parts well. It is to be regretted that with such responsibilities laid on them they should be held in so little esteem.\*

2. It has appeared that the appointment of a police force, of its officers and men, as well as of its superintendent, ought to be removed as far as possible from the influences of political parties. This is the more necessary on account of the rank of life from which the men are taken, which allows of corrupt approaches on political accounts, with the view to shield the underlings of leaders in town politics. The best way of appointing a police is perhaps in large cities that the mayor be responsible for the composition of the corps in a city, or that a

\* Comp. Bluntschli, Staatsr., ii., 175 ed. 1.

board having no connection with the parties in the place should make the selections. It is unnecessary to say that a police in cities ought to be under strict surveillance and liable to speedy trial, exposing them to loss of place and other penalties. The constables and other rural police may be elected by the community with safety ; for in country-townships the character of every one is known, and the office, being not generally capable of furnishing an entire support, will be less sought for on party grounds.

3. The responsibility of the arresting officer is a principle of law which is essential to individual liberty, and yet the most careful officer may arrest the wrong person and do him serious harm. In cases, therefore, where the officer is in no respect blameworthy for the fact or the manner of the arrest, the society ought to be responsible; since the evil is incidental to a system necessary for public security.

4. As we have already remarked, a detective police ought not to be a body by itself, although its functions are analogous to those of a court, while the functions of other policemen have more of an administrative character. The most experienced, the best acquainted in the corps with the haunts and friends of knaves, will naturally be set apart for this work. It is strictly a public duty. What right, then, has any private man, who has lost notes or bonds, to compound through the detective with the thief? Will not the possibility even of thus escaping the consequences of a crime by giving up part of the plunder tend to increase the number of criminals? And will not the detective, acting as an agent of a private person, be turned aside from his proper duty of bringing knaves to justice, so as to think mainly of the percentage that will fall to him? Nay, may he not be led to help on a crime by this practice of private persons,—to instigate a rogue first and then to screen him afterwards? Where the detective knows who the culprit is, and will not bring him to light unless an advantageous bargain is made with the injured party, he makes himself an accessory to the crime. Where the injured party is guilty of compounding of felony he is punishable by Eng-

lish law with fine and imprisonment, and formerly was held to be an accessory. And by a statute of the last century, "to advertise a reward for the return of things stolen, with no questions asked, or words to the same purport, subjected the advertiser and the printer to a forfeiture of 50l. each." (Blackst. iv., p. 134.)

### § 244.

III. The care of public health is closely connected with public charity or the care of the poor and suffering; and it may need a supervision of its own to prevent the introduction of dangerous diseases from abroad. It is also most closely connected with police regulations relating to the way of building houses, their condition as to cleanliness and drainage, the removal of all morbid excrements, and the supply of wholesome water. We shall consider only how far a sanitary police can be used for curing or for preventing disease. The need of sanitary law mainly touches compact towns. A population scattered over farms, with wise precautions against impurities being mixed with water or milk, will need in ordinary times very little supervision, and the medical men of the neighborhood, when epidemics invade a rural district, are generally able to give the needful directions to the people without the assistance of officers of health.

We will consider then, especially, compact towns, and first, public interference in curing diseases, which was first attempted in quite ancient times. Public physicians are mentioned by Diodorus of Sicily as being employed among the Egyptians. They received a salary from the public, and if they were unable to heal the sick while following the written recipes of ancient physicians, were subject to no charge; but if the patient died when they pursued a course aside from these written traditions, they were subject to capital trial. (i. § 82.) In parts of Greece, also, publicly paid physicians seem to have existed. (Plat., Gorg., 514 D.) As early as the first age of the Roman empire mention is made of town-physicians in Marseilles and other towns in Gaul. Antoninus

Pius made an ordinance for the province of Asia that in every town, a number of physicians, nominated by the town authorities and removable from office by them, should enjoy immunity from all public burdens. These physicians, five, seven, or ten, according to the size of the place, received a salary from the town, but could also enter into private practice. Later still the usage of appointing such town-physicians became common through the Roman empire. They formed an *ordo* under which the other physicians stood; and when a new member was nominated by the town authorities an examination by the college of the *archiatri*, if favorable, entitled him to the first vacant place.\* The same practice has been followed in a number of modern towns and countries. It seems that a desire to relieve the sufferings of the poor, and perhaps the prevention of the spread of disease have been the leading motives for setting up the institution. In modern Christian times hospitals for the sick poor, in part, if not more effectually, supply the same needs, together with visits of health officers to the houses of those who apply for aid.

The great office of modern sanitary regulations is to prevent the introduction and spread of disease. Here a very wide field is open, which can be properly taken care of by no association of medical men or of private philanthropists, but needs that public authority should be vested in some board or committee. This sanitary police consists of many parts, such as a good sewerage, removal of garbage, an enforced system of ventilation in schools, united with the proper system of warming, the placing of graveyards outside the limits of dense population, together with all necessary precautions against diseases of foreign origin. A large outlay in the first instance is required for these objects, but it will be met whenever judiciously made by a diminution of the death-rate and the increase of the tone of health in the town or city. Scientific and experienced medical men ought to take the lead in such enterprises and to be clothed with all necessary authority.

\* See more about this usage in K. Sprengel, *Gesch. d. Arzneikunde*, vol. ii., p. 225, onw.



## § 245.

IV. The care of the roads, again, in the rural districts, is not very difficult. It is one of the most important duties devolving on the authorities of the township, and demands supervision whether yearly repairs are let out by contract or every one is made responsible for the ways along which his own land is situated. In cities there is need of much more of system, as to streets, sidewalks, and the keeping of them clean; but there are no questions of difficulty, so far as I know, that meet us at this point except that of taking private property for public improvements and deducting the benefit to the proprietor from his damages. There is however, in regard to ways of communication, whether common highways, canals, or railroads, one very important question—Whether they may best be constructed by private enterprise or by public. To a great extent private enterprise has built such works in Great Britain and the United States, owing in part to the ease with which, under free governments, associations of capitalists are formed and can manage large affairs. In other countries the same end is accomplished by public boards and outlays. Nor are there wanting instances of the same construction of public roads by the state in this country. In this way was the Erie canal undertaken, when the success of such adventures was quite uncertain, together with some other public works, some of which were unsuccessful in bringing adequate returns and ended in repudiation. Either way of construction is consistent with the theory of state power. The state's right to take land, on paying a just compensation, is transferred in one of the cases to agents who are authorized to do its work in its stead. But they take a risk upon them, and then it is not wrong that they should have the tolls until the state should choose to pay them the value of their enterprise. As for permanent possession of a railroad franchise by a private corporation, there are grave reasons for holding that a state ought not to grant such a charter. For the power of such a

Public roads.

body in the politics of a country may be very corrupting, and if not, it will often seek for a control over legislation which ought never to belong to managers of pecuniary corporations. Thus, when their business is successful and a charter is asked of the legislature for a new road which may take away from an old one its business, the managers of the latter oppose it with all their might, and parties are formed sometimes with this object principally in view. The cure for all this has been sought in a general railroad law, allowing capitalists to combine to construct new roads, not indeed in the near vicinity of the other, for that would be wanton injury and might mean only that that the new company was to be bought off, but in the same general direction between two great depots of trade. Here, again, there is need of watchfulness; for the companies, without question, will not long run rival lines but will make some compromise either against the interests of the community or on a fair basis. And at this point another difficulty arises, owing to the fatal ease with which new enterprises are started and the jealousy with which producers of heavy articles accuse the roads of making extravagant charges for freight. The companies to a considerable extent have a very small amount of shares, and being unknown, as well as engaged in an enterprise attended with risk, they borrow at large rates of interest, pay great sums to brokers to procure money for them, pay contractors in bonds not worth their face, and when the road is ready, have an interest which they can with difficulty meet. The road may have cost twice as much as it would have done with proper management; and the double rate of interest must come chiefly out of the freight on produce. The farmers complain; laws are made at their suggestion in regard to cost of freight and other things, which if extended to other branches of business would involve them in ruin. Thus the misconduct of roads and the folly of legislators tend to produce a condition of things most alarming, if not ruinous, for all business interests; the only good result being that where such things are allowed, no more money can be borrowed for a long time to come.

Experience then, we may say, has its stories to tell both of roads built by the state mismanaged, and of roads built by private corporations worse mismanaged. This consideration, however, in a country like ours, is in favor of the construction by private capital, that if the state build a road in one part of its territories, there may be a claim for another in another part, where it is less needed, and so every division of the state must have its *rights*, which must be secured by combination. Thus a great debt is accumulated which the state cannot meet, and so the most disastrous of all things to the credit and growth of the state and most dishonorable takes place,—repudiation, or state bankruptcy. To prevent this great evil there ought to be a limitation of the amount which a state may borrow, or some other efficient remedy, if any is possible. Were it not for the inconsiderate legislation, of which we have had examples, the construction by the state would seem to be the better way; but we are obliged to decide that to commit such works into the hands of private corporations is preferable. But there is still a third possible plan—that the United States should build all the roads which can serve as links of transportation from state to state, and either lease them to companies or manage them by its own officers. If this be within the constitutional powers of the general government (in regard to which, as is well known, there has always been a controversy between the advocates of strict interpretation, or of state rights, and the advocates of liberal construction, or of large federal power), it is still subject to very serious objections, the greatest of which, in our judgment, is the tendency to accumulation of power in congress and the executive, together with the influences, often of a corrupting nature, which attend on having the whole transporting power of the country in the hands of the general government. The best plan, then, with the light of past experience, seems to be that of having in each state a general railroad law, under the stringent rules of which the roads must be begun with an outlay of paid capital and with only a limited power of borrowing, and be afterwards held to do

their appropriate work in fidelity by the fear of being brought before the courts, of losing their charters, and possibly of fine and even confiscation.

### § 246.

V. When, in the progress of society, a people substitutes  
Taxing power of the state. the payment of taxes for personal service in the army and elsewhere, a double danger is incurred; trained mercenaries are supported who have a looser connection with the nation than with the government, and the nation loses the power of resistance to armed force, and has less sway by its opinion over the government than before. Hence, as we have seen, political rights have more to do with the control of the people over the taxes than with any other political action. It is a rule of safety and of justice, that of all powers the taxing power should be kept closest in the hands of the people by the constitution. The system of taxes must neither favor nor oppress any class or kind of industry. To tax the fewest articles and the least necessary, especially those which will not be lessened in their consumption by the tax because they are used by a wealthy class, will least interfere with the pursuits of industry. Questions of ease and cheapness of collection, and of so taxing as to prevent and even not lay a snare for false returns, are of extreme importance. Nor ought a people to be deceived by any indirect process in which the expenses of the government are defrayed. But the subject of taxation runs out on its practical side into endless details; one branch of political economy is finance, and on that branch nations hitherto have been only approaching towards settled views. A good system of taxes founded on true principles is economical, not only by not over-burdening industry, but by allowing it to expand without needless restrictions.



## § 247.

VI. So far as the protection of industry simply covers the security of the individual in his property and in the exercise of his calling, all that is needed is non-interference and the cheap execution of the laws. But there are many branches of industry which employ the capital of companies, and a government is bound to encourage, under proper limitations, that most efficient principle of association, which is called by Prof. Von Holtzendorf "the fundamental characteristic of modern society." \* The formation of companies for all lawful, industrial purposes ought to be entirely free, under such liabilities of the active members or directors, and protection of the passive, or simple shareholders, as are found best for society and for the shareholders themselves against the directors. Incorporations of this kind ought to be formed not in the way of privilege, but by a general law. A limited liability of the shareholders seems most just, as many of them cannot watch the conduct of the directors, nor judge of their honesty and discretion. The directors' liability ought to go much farther. Associations of workmen, co-operative unions, need no especial laws either for their security or encouragement.

Encouragements of the industry put into the shape of new applications and combinations of mechanical powers by means of patent laws have been noticed already. If such new ideas in material forms can be property from the beginning, and if, as is admitted in all civilized countries, the idea itself is a pertinence to the individual, the question arises whether it is not property for all time, and why do patent laws limit the duration of the right? This also has been considered, so that here it is enough to say that such a length of years ought to attach to the protection afforded by government, as will be enough to allow a man to reap an adequate gain for his labor bestowed on the invention.

\* *Principien v. Politik.*, p. 272 (1869).

Patent laws are a necessary kind of monopoly in which the government sanctions the sole right of making, or of selling to others the right of making certain things, over which by natural right he, as inventor, ought to have the control. The reasons of justice and of public policy here are manifest. Ought *any other* monopoly to be allowed? And here we refer to what is called a protective tariff, by which it is intended to make certain articles, produced in foreign countries, so much dearer than competing articles at home, that they will be excluded or admitted only because a sufficient quantity of the articles in question can or cannot be furnished by domestic industry. We call the employments cherished by protective tariffs monopolies, since if the tariff does its work to the extent of the home supply, the people of the country are forced to use those articles because others are made more dear. And as articles of prime importance, as stuffs for wear, iron, coal, and the like, will naturally be protected; such laws have very serious consequences in the way of a tax on all other industries, and on persons consuming the protected articles. We will not enter here into the argument on a protective tariff, as distinguished from a revenue tariff. Happily, all writers of credit, with scarcely an exception, are agreed that it is built on a false policy. I will only say that it involves the tyranny of preventing the producer from sending his wares to the best market, that it makes it necessary in the end to protect raw material, as well as the products for which they are needed, and thus partially defeats its own ends by increasing the price of the former; that it leads to endless bargains and sectional disagreements in a country where raw materials are the chief products; that it draws away a nation's energies from that which it can raise to the best advantage, and even lays a tax on such products; and that by lessening in these ways the amount of accumulated capital, it retards the growth of a country and the successful prosecution of many branches of industry.

## § 248.

VII. It has, we trust, been made to appear: (1) that no parent has a right to withhold an education from his child, if it be within his reach; (2) that a community has a right to make compulsory the education of all the children within its territory; (3) that thus it becomes a duty, or at least *may* be a duty of a state to establish a public system of education; (4) that the right of free teaching ought not to be invaded by any state laws or any system of state teaching.\*

There are some points of difficulty connected with the relations of the state to education, which we shall consider formally in order.

1. How much education must be supplied by the state to the children within its borders? We answer by saying that the children should be compelled to learn so much that they may be able in after-life, by exercising themselves in what they learn, to receive knowledge through books, to communicate with others at a distance by pen and paper, and to keep accounts. Beyond this, which all ought to know, and which ought to be essential for being admitted to the right of suffrage, the state may not be obliged to go.

2. Should universities, high-schools, and grammar-schools be founded by the state? The stress of this question lies on the universities; for the preparatory places of training, when once there is a demand for them growing out of the desire of acquiring the highest forms of knowledge, can easily be furnished by towns or private persons; and such endowments are favorite ways, for inhabitants of the towns, of showing their attachment to the place of their birth or their residence. With regard to the universities—by which we mean institutions where all kinds of learning are taught, and which form corporate bodies with power to regulate the admission, the

\* Some of the points here discussed are briefly spoken of in §§ 78, 79.

course and incitement to study—the first point worthy of notice is the different position which they occupy in different lands. In Great Britain, to a large extent, they are truly self-subsistent institutions over which the government exercises little control, except by its power of visiting all the institutions of the country. In Germany the government creates the university—as that of Halle was created in the last century, and those of Berlin and Strasburg in the present,—appoints and pays the professors, and makes or gives to councils or to faculties, subject to control, the right of making all necessary laws. But this is peculiar in Germany, that the liberty of teaching has long been in the hands of the professors by a kind of common law, so that there is almost entire freedom of propagating from the professors' cathedra any opinions, however strange or bold, which do not endanger the state itself. Only now and then in the department of theology are enormously unchristian opinions uttered by a professor of Christian theology,—followed by his deposition. In France the same connection of the teaching body with the state subsists, but with less freedom of teaching on the professors' part than in Germany, and recently with the permission to found free universities not subject to the state's control, in which the state does not appoint the teachers nor contribute to their support. In the United States there are few institutions which can be called universities in any sense. The system of education began with erecting schools, answering to the English college within the university; which, after the invention of printing, and more after the reformation, almost paralyzed the functions of the university proper. Add to this that some of the sciences, formerly considered to be a part of university teaching, migrated to large cities from some of the seats of learning, as was the case with law and medicine; which thrived better at London than at Oxford and Cambridge, on account of the superior advantage of pursuing them in the larger town. But the colleges in this country, founded after the English ones, by and by extended their courses; new departments in medicine, law, theology, and even art,



were engrafted on the old stock, so that they are universities and something more. These were followed by public universities in a number of states, most of which, while possessed of at least three faculties, have never, we believe, given instruction in theology. And this reveals an inevitable difficulty of state universities in a country where there are a number of Christian denominations with equal rights. No one of them will consent that another shall occupy the chairs of theology at the centre of learning, so that either there must be nothing taught in this science, or any denomination may be allowed to establish its school under the wing of the university, or the sects will prefer to endow and control their own schools. This last plan has been almost everywhere adopted in this country; but with some advantages it involves this evil, that a single department by itself, whether law, medicine, or philosophical science or theology, is in danger of becoming narrow, and of aiming at merely professional results. There is danger that the evil will act on the teachers and on the students, leading them to undervalue all branches outside of their own, and giving them within their own departments a shallow, conceited spirit.

But besides this unwillingness of the denominations that one should have advantages from the state which all cannot enjoy, the trenchant principle of entire separation between church and state will involve a divorce between the state and theological science, for the science itself will have closer connections with one church than with another. In fact, that science, on its historical side, must include the examination into the nature of the Christian church, its organization, the rights of the laity, and kindred questions. We can hardly conceive, then, that a complete university can exist under state patronage in the United States.

But, still further, how can history or ethics be taught in a university unless the professor expresses himself on great events like the reformation or the papacy of the middle ages, which have to do with the progress of mankind. Here, if nearly all Protestants are agreed, Catholics will differ from

them entirely, and may justly urge that their opinions are attacked without their having an opportunity to defend them. Thus history cannot be taught, or must be taught by rival professors, mediævalists, or men with a modern spirit. Again, although it would naturally be thought at first that mental and moral philosophy are a field where all theists can meet together, this is not found to be the case; and especially in ethics will the freedom and responsibility of the individual man be subjects of conflict among Catholics and Protestants. Even in Great Britain it was thought necessary in the Dublin University bill of 1873 to exclude the teaching not only of theology, but that also of morals and metaphysics, as a necessary part of instruction. The reason for this may have been the desire to avoid the suspicion that the Catholics would get hold of these chairs; but whether it were this or the desire to conciliate Catholics towards the project; here we see one of the most enlightened men of the age consenting to urge through parliament a mutilated university, one that belied its name, and this, we suppose, because he thought no other plan feasible. History with even greater reason should be excluded, for who could calculate the power of a man like Ranke, to spread convictions which he could not but utter, touching the very essence of Catholicism as tested by history?

But we may go farther and say that the natural sciences by the same logic of sects must be excluded from a state university course in this country. What right has the state to permit a man to teach a doctrine of the earth or the solar system which rests on atheism, if theism and revelation must be banished from the scholastic halls. Why permit evolution to be publicly professed more than predestination? Thus, when the denominations become fully aware of the principles involved in modern science, they will not fail to complain of the state as taking sides against religion, and will not fail to aim their blows against the university.

Hence it would seem that there is an insuperable difficulty in the way of such state institutions, which no time, no com-

promises can remove. But the practical difficulties are equally great. They arise from the causes which tend to disturb the stability of state institutions of higher learning—causes from which state prisons or deaf and dumb asylums are safe, such as the perverse notions of men of crochets, the misplaced economy of legislators and the intrigues of parties. But the directors of higher institutions of learning to a degree change with the changes of politics. Some professor has given offence by his freedom in expressing his opinions on public measures, and is made an object of attack. Some politician thinks that learned education ought to pay for itself without receiving aid from the public. There is no certainty that the university will survive a half-century. The medical faculties are convulsed by having a homœopathic professor forced upon them by the legislature. Next there is an attempt to open the course to women as well as men. Then the legislature refuses to make appropriations for the most necessary apparatus. Then the colleges in the state complain, it may be, that the low price of education at the university is driving them out of the field. These difficulties would be felt anywhere, and not least if the national legislature undertook to create a great university at the seat of government.

From all this it would appear that universities supported by the state cannot have complete faculties, nor be sure of a healthy, undisturbed existence. On the other hand, universities and colleges under the management of persons acting through a private charter can not only be provided with all the faculties, but are free from the instabilities to which state institutions are generally subject. If they are controlled by boards consisting in whole or in part of men belonging to a Christian denomination, it is for the interest of all that the religious views of students and of their parents should be respected; nor can there be found throughout the United States, as we believe, any place of higher learning where a proselyting spirit animates teachers or guardians. These colleges are indeed far too numerous; they are poorly endowed for the most part

and not always well manned ; but it must be remembered that there had been little demand for the highest education in this country ; that the principal places of learning are ahead of the demand ; that the probabilities that a number of these will expand into institutions teaching the whole circle of the sciences is great, if we may judge from the past ; and that endowments are full as likely to come to them from private munificence, as that state institutions will have permanence and success. Above all, at such places only can it be in the teacher's power to cultivate the moral and religious sentiments of the scholars,—there alone the fatal divorce of religion from learning and science can find no place.

3. The state may, however, without any especial difficulties set up schools of technology, and of all branches of special education outside of the learned professions. Is there any obstacle in the way of its establishing schools of the fine arts also ? None that we can see, if the great outlays for museums and libraries are within its reach. Yet it may be doubted whether the teachers themselves ought not to have ample freedom, a freedom which would be scarcely compatible with state control.

4. We now return to the common school system in order to discuss some questions of organization, management, and instruction in which the relations of the state and the town or district are involved. If there is to be a school system it must proceed from and be supervised by the state, and yet there ought to be powers given to the towns to enlarge and improve its schools without asking leave of the legislature. In such a case it ought to be required that the town should contribute by tax an amount equal to all improvements, whether they consist of buildings, apparatus, or new studies. As for the management of the schools, men of the highest qualifications ought to be appointed, with the duty of examining as well the schools as the proceedings of towns and school committees, and with certain discretionary powers. Districts, for instance, may well be forced to provide better school-buildings than those that now deface some country towns,



on pain of losing their share of the public school money. The appointment of teachers ought to proceed from the school committee of the district, with some control over their doings by the superintendent. The dismissal of the teacher for incompetence or misconduct should rest on the same qualified decisions of the committees. The instruction should be so far fixed that no deviations ought to be allowed, without the superintendent's permission. Discipline must be committed to the teacher within the limits of a general law.

An irritating question has arisen in recent times touching the reading of the Bible in common schools. It amounts to this, on the negative side, when unbelievers in the Bible advocate it, that religion ought to be as much kept out of the school, as the church ought to be kept separate from the state. When Catholics take this side they complain that a Protestant version is forced on the children belonging to their confession. But they go farther, also, than this: they fear the perverting influence of association with Protestant children upon their boys and girls, and would be glad to have the sum paid for the education of their number of children by the state devoted to schools in which teachers and all arrangements should be under Catholic control. And the reason for this lies not only in the fear of evil communications, but also in the principle which, in itself, is greatly to their honor, that religion being of prime importance to man, they want an education for their children which can be not secular only but religious, in their sense of the word. It is no answer to their claims to say that in other cases, where parents do not like the schoolsystem, they send their children to private schools; for the ready answer is that the children of Catholics belong mostly to parents in humble life, who must make use of free schools or of none at all. But the last alternative is impossible where education is compulsory. Nor, if Protestants should say that they form a small minority and ought to abide by the opinion of the great part, would that be a fair view of their case. It is with them a matter of conscience, and the state respects the demands of conscience until they become absurd. What

absurdity is there in wishing to have children of a particular class taught within the denomination? It is true also that they pay less in taxes by far than the ratio of their numbers would require, but for the state the children are a body, they are counted and schooled as so many polls. If there were no compulsory education, as there is not in many states, one answer would be, "keep your children away;" but it is not an answer in the interests of the state's order and safety, nor in that of sectarian kindness and peace.

In many cases where the Catholics are so few that no separate school could be supported, there will be little trouble met with from this "Bible question." If in others the number of complainers is great, I would without hesitation advise the giving up of the Scriptures as a reading book for the sake of peace, and the more readily because it will always be read in a perfunctory, unintelligent way. But further than this we ought not to go. The state ought to do nothing to break up the communities into factions with different educations; its object is to produce a unity and common feeling everywhere. If separate schools were allowed for the Catholics, Protestant sects would follow, and thus we should have strictly sectarian education, the evils of which would spread far and wide over society. If, again, the Catholics would be content with having their children allowed to be absent from reading of the Bible or from school prayers; or if their priests should wish to have a time given during the week, at the school, for religious instruction, I do not see how any serious objection could be offered. In regard to the main question it seems certain that neither sectarian schools will be paid for by the money of the state, nor that the system of common schools will be given up.

There is a subject of great practical importance connected with education by the state, on which a few remarks may find a place here without being inapposite. Of what use to the state is the education of the children, when it only aids in opening the mind, without giving any moral principles to the pupil whatever? No small part

Moral training.  
Can the state undertake it?

of the children brought up at common schools bring no moral training whatever from their homes, and as to religion, their minds are mere *rasæ tabulæ*. How far can or ought the teachers in schools to apply a remedy to this evil? The duty of the state seems to be clear in regard to all those branches of morality that have to do with its highest interests, such as honesty, chastity, temperance, truth, and the evil of revenge, as well as in regard to the inculcation of *political* duties, such as obedience to law, respect to the rights of others, love of country. Where are the voters under our system of free suffrage to learn their duties in that capacity, unless from the churches where many of them are never seen, or in the school? The state of Massachusetts, in one of its constitutions, declares it to be the duty of teachers of schools to impress on the minds of youth "the principles of piety and justice, and a sacred regard for truth; love of their country; humanity and universal benevolence; chastity, moderation, and temperance; and those other virtues which are the ornament of human society and the basis upon which a republican constitution is founded." "Moreover," it is added, "it shall be the duty of such instructors to endeavor to lead their pupils, as their ages and capacities shall admit, into a clear understanding of the tendency of the above-mentioned virtues to preserve and secure the blessings of liberty, as well as to promote their future happiness; and also to point out to them the evil tendency of the opposite vices."

All this is very good, but if the teacher of the common school is to give instructions in morality, so far as it relates to the well-being of society and the state, he must be instructed himself in his duties and in the subject-matter of them. Books on morals level to the capacity of children must be provided, in which at least the leading duties towards the state will be inculcated. But is there any possibility of stopping here; and if there could be, would the prudential morality of such maxims as "Honesty is the best policy" do much good to a child who finds that he can cover up a misdeed by a lie, who has no far-reaching insight into the results

of things and the final issues of conduct? The ancients in their best systems of education did far better service to children's natures, considering what they knew and what they did not know, than we do under the modern dispensation. They aimed by a public training of children to improve the habits and character, to make the young obedient to the law and good citizens when they should grow up, and they called in religion, which, poor as it was, added its sanctions to morality. In the middle ages, the instruction of the young was mainly in the hands of ecclesiastics and had too exclusively religious a cast. In modern times this is passing away. The extreme is reached among us where religion is full of benevolent helpfulness within its own sphere; but a definite line prevents it from invading the sphere of state education. We have not yet quite reached the extreme that the teacher must never mention God to children's ears, but it must logically come, if modern unbelief is to have the career that many look for. Shall it come to this that not even the existence of the Supreme One is to be assumed in the schools, nor any book introduced which expresses any definite faith in regard to providence and final causes? Or, if this should be the course of opinion growing out of the doctrine of personal and family rights, will not one of two things happen—that all the churches will become dissaffected towards the common schools as the Catholics now are, and provide teaching for themselves, while the schools will be left to the *fæx infima populi*; or that some kind of compromise will be made between the sects and the state, such as all of them with one exception would now disapprove.

#### § 249.

VIII. We have seen that no man has a right to be supported by the state, or even the right to be supplied with work; but the benevolence of Christianity and the sympathies of man for his brother man will not allow the rule of strict justice to govern in society. Private compassion towards the poor, the stranger, the exile, is natural

Public charity.



all over the world. In the Hebrew law, humanity breathes forth continually, but scarcely goes beyond moral precepts, such as that of giving back a pledged garment (Deut., xxiv., 6), or making it unlawful to take a widow's raiment in pledge (ib., v. 17), or allowing the poor to glean after reapers, and in the corners of fields (Comp. Saalschütz, Mos. Recht., chap. 33). The Athenians,—a humane people owing to their equality,—went farther in the one point of aiding the poor by law. Among them, and nowhere else in Greece as far as is known, was there public provision for the infirm poor, which is said to date back as far as to Pisistratus or Solon, and to have been confined to such as had been rendered unable to work by accidents in war. Afterwards the dole, which never rose above two obols nor fell below one, was granted to all poor persons incapable of work who were worth less than three *minæ* (nearly sixty dollars), and were allowed by vote of the people after examination to be placed on the list. Thus they received less than those poor men who sat in the assemblies and the dicasteries. Boeckh and Schoemann estimate the whole annual expense of the city on this account at from five to ten talents.\* Besides this there were clubs at Athens (*ἐσπῶναι*), for common purposes, religious or social, or for mutual support. At Rome there seem to have been no institutions of charity, but from the time of C. Gracchus onward grain was bought up and sold at a low cost to the poor of the city, until almost one-fifth of the revenue is said to have been used for this purpose.† The law of C. Gracchus was not dictated by humanity so much as by demagogy; it gave the right to the Roman citizens of living at the expense of the state, by allowing them to buy a certain number of Roman modii of grain for about half price. The effect of this was to depress

\* See Schoemann, Gr. Alt., i., 442, and Boeckh, Staatshaush. d. Ath., B. ii., § 17.

† Cic. pro Sextio, xxv., 55. Comp. the note of Halm. What Cicero says seems to amount to this: that almost a fifth part of the revenues was used up in the remission of  $6\frac{1}{3}$  asses on every modius of wheat sold by the public. This lowered prices, as they then were, nearly one-half. See also Lange, Röm. Alt., ii., § 138.

the cultivation of grain in Italy, as well as to degrade and increase in number the Roman proletariat. A law of the notorious demagogue Clodius distributed grain without compensation. Afterwards, colonization on a great scale removed part of this evil of pauperism. When Cæsar became in fact sole ruler of Rome, with the same object in view, he by law remitted one year's rent of houses in Rome and Italy, not exceeding the value of 2000 sesterces. But he put a check on the distribution of corn by reducing the number that had received it from 320,000 to 150,000; this number was made the maximum for the future, and the persons who should die were to be replaced by the poorer among the new applicants. It does not appear that able-bodied men could not partake of this gift if only they were poor. How Cæsar's restrictions deserved the laudations that a modern historian has given to them, we do not discover.\* The largesses of Augustus, chiefly from his own private means, to the Roman lower class, were very vast; and to mention but one thing further, which had more the look of humanity than all the rest, the gifts, made under the Emperor Nerva and afterwards, to poor boys and girls, called *alimentarii pueri et puellæ*, in many of the towns of Italy from the funds of the towns, were dictated apparently by the decrease of population and the wide-spreading decay of material prosperity. Private persons also gave foundations for this purpose, as the younger Pliny to the town of Como (Plin., Epist., i., 8, comp. Panegy., 26-27).

The Christian religion gave a new impulse to humanity proceeding from faith in a common Saviour of men and in a brotherhood of believers, so that more was done in the west during three centuries from its origin than had been done in all time before. Thenceforth not only alms-giving but many institutions of charity for the sick, for widows and orphans, for the burial of the dead, were established, while individual gifts were made for the ransom of captives, the relief of debtors, the emancipation of slaves. The government under

\* Mommsen, iv., 591, Amer. ed. of transl.

the Christian emperors aided in these works of love. The duty of helping the poor and miserable was even turned into an obligation by illogical thinkers. Jerome says that the words "unrighteous mammon" are justified by the fact that all riches come from iniquity; one cannot gain unless another loses—that same absurd notion which has been expressed more than once by political economists. In the same strain the interest of money was condemned, partly because Jew could not lend to Jew, partly because usury was taken without work. Even communistic notions prevailed, such as the declaration of Ambrose that "nature has created the right of community, and it is usurpation that has made property." But such statements are to be ascribed to the desire of pious rhetoricians to draw men from their covetousness by doctrines most opposed to it. The efforts of humanity were, if not always judicious, generally in the right direction. In the middle ages charity took the same course in the cities, where a multitude of hospitals for the sick, the poor, and other sufferers were founded; while in the country the serfs on the lands of seigniors had little help except through the clergy. The monasteries were open to the needy and even to the beggar, in whose lazy and vagabond life the monks did not see as much to find fault as we do now.

It has been sometimes said that the suppression of the monasteries in England took away from the poor their principal friends, and that thenceforth the help of state law became necessary. Mr. Hallam considers this to be an unfounded opinion. "The blind eleemosynary spirit," says he, "inculcated by the Romish church is notoriously the *cause*, not the *cure* of beggary and wretchedness. The monastic foundations, scattered in different countries, but by no means at regular distances, could never answer the end of local and limited succor, meted out in just proportion to the demands of poverty. . . . It is by no means probable that the poor in general were placed in a worse condition by the dissolution [of the monasteries]; nor are we to forget that the class to whom the abbey lands have fallen, have been distinguished

at all times, and never more than in the first century after that transference of property, for their charity and munificence." \* May not one cause of the increase of pauperism have been the disappearance of the yeomanry, who would be succeeded gradually by farm-laborers on the soil of the large proprietors? † Possibly another was that the best laborers flocked to the towns, as these began to start upwards, and to offer more inducements to industry.

By the first statute for the relief of the impotent poor, passed before the dissolution of the monasteries (1535, 27 H. 8), a fine was imposed on giving alms to beggars, and collections were to be made in every parish. In 1572, under Elizabeth, compulsory contributions were first tried. In 1601 the famous Poor Law Act of 43 Eliz. was passed, which required the parishes to provide for the support of maimed and impotent paupers, and to provide work for the able-bodied poor who should be without employment. An act which was passed in the year 1662, and introduced the plan of settlement into the poor law system, was a necessary corollary to the earlier ones; for, if the parishes supported their own poor and were compelled to do it, why should they receive the poor from other parishes also, which lay under the same obligation. From this time the poor man grew more like an *adscriptus glebæ*; if he became impoverished in another parish where he acquired no settlement he must be thrown back upon his own parish, as if it were to be his prison. Among the laws afterwards passed, that of 1795 seems to have been the most harmful. It adopted the plan of adding to wages in the parish, when they were thought to be insuffi-

\* Const. Hist., i., ch. 2, p. 109, onw.

† Mr. Brodrick, in Cobden Club Essays for 1875, p. 22, uses the following words pertinent to our subject: "The fact remains that by the reign of William IV. the descendants of freeholders, who once sat as judges and legislators in the courts of their own county, hundred and township, had sunk into day-laborers but one degree removed from serfdom, dependent on individual landlords for the humblest dwelling, and on landlords assembled at quarter or petty sessions for the security of every civil right."



cient, a sum from the poor rates,—thus making large classes, who were self-supporting before, objects of charity. The operation of the poor laws in degrading the poor, in widening the circle of relief, in helping the unworthy and dissolute, in laying a heavy, almost intolerable burden on the properties in the parishes, reached its acme during the early part of the present century. It is said that the poor rates in 1833 reached the amount of 8,600,000 pounds sterling. In 1834 a new law was made, after a commission appointed for the purpose had made a careful report. The principles of this law were to confine relief to the destitute, to administer only to the wants of the aged and of orphans at their homes, and to require the able-bodied to enter workhouses, if they desired aid. A new system of workhouses, serving for several parishes, was substituted for the badly regulated parish workhouses then existing, and a control was established over the new boards of elected guardians of the poor, through a board of commissioners in London. The system justifies itself by its fruits, which are seen in an increased self-respect of the poor, in a diminution of the number receiving charity, and in the greatly diminished sums expended on this account, reducing them in their ratio to the population as much as one-half. Still all could not be effected which was desired, and probably never will be, until landed property shall be within the reach of the lower class to purchase. The “ Union-chargability Bill ” of 1865 removed one evil arising from the fact that when one or a few proprietors owned a whole parish, they would refuse to have cottages built on their lands for their laborers, in order to prevent them from acquiring a settlement there. The act requires each separate union of parishes, instead of each parish, to have equal rates, thus removing in great part the motive of these selfish proceedings of the landlords.\*

I have briefly given the particulars of English legislation,

\* Molesworth, *Hist. of Engl.* (1830-1874), iii., 254.—Comp. the same writer, i., 309 onw., for the new poor law, May's *Const. Hist.*, ii., 564, and many others.

in order to set forth, by a striking example, the difficulties which attend the subject, and the vastness of the evils of a bad system of public charity. The English law has shaped ours in some of the older states, where town-aid and settlement are received principles of the poor laws, and where help at home is afforded to the able-bodied more or less in the cities. We may be sure that the problem will become more serious as the country grows in density of population and in its number of manufacturing towns. There is also more danger here than in England that indiscriminate charity will creep into the large towns and work the same evils as there. In the country towns the evil is far less; the poor are known to the inhabitants, taxation is under more rigid inspection than in the cities, and the system of letting out the relief of the poor to the lowest bidder is not an inviting one to the tenants of the poor-house. There are, indeed, few of the mischiefs of pauperism felt outside of the large towns, but we desire to call attention to one or two possible evils in the future, and to some of the best means of administering relief.

1. It ought ever to be insisted on that humanity and state order are the reasons for relieving the poor, and not justice. The poor have a right to work when they can find work, but have no right to demand either work or charity from the state. If the other theory should be adopted, into which men are apt to fall, it will have far-reaching consequences. First, it will give the state a right to control the citizen, or, at least, the poor citizen. It may then say, "If you have a right to charity or to have work found for you, then I have a right of self-preservation against the increase of a class that cannot support itself. I have a right to prohibit marriage until you can support a family, as well as a right to see to it that you labor afterwards, so that you shall not become chargeable on my resources." Again, the state would, if thus bound in justice, rightfully demand that a part of the wages of men entitled thus to support should be paid over and laid up for the future. And still further, if a man wastes his property in drink or by an idle life, he ought to be treated differently from

those who, by calamities not of their own causing, are worthy recipients of the bounty of the public. These ought to be separated from the unworthy pauper and to have superior fare.

2. May not the law of settlement be a great hardship in certain cases. We will suppose the case, that a country town with good water-power is chosen as the place for a number of manufactories. Two or three thousand workmen are collected together, and when disasters befall the business of the country and the manufacturers are involved in ruin, the families of workmen have acquired a "settlement" by six years' residence, without being an expense to the township. They have thus a right to a support; but when the capitalists and their capital is gone, there is perhaps not one wealthy person left behind. Now suppose five hundred families should remain for six months or a year in this dismantled place; would not the burden be crushing to those who barely make the ends of the year meet, and have the calamity besides of losing the home sale of what they raise on their farms? The law of settlement then may be a very injurious law, which shuts up the obligation to aid the poor within so small and needy a population. It would seem from these extreme cases as if there ought to be some equalization of burdens between the different communities.

3. No public aid to the poor or the suffering should supersede the activity of private persons. If it were possible, that is, if the burden thus thrown on the benevolent were not too great to bear, the management even of the public relief given to the poor and suffering would be advantageously put into private hands. As this seems impossible, there ought to be as much thrown upon humane and Christian persons, in those acts of benevolence which require immediate contact with pain or misery, as they can bear. Besides this, they will of course direct the methods of employing the funds of the various private benevolent societies; and in more loosely organized ways will aid the poor and helpless of their churches and their neighborhoods.

4. If it is the state's duty to help the unfortunate poor, it

ought to be a rigorous rule that the drunken, the dissolute, the shiftless, shall not be put on an equality with the better class of paupers. Hard work must be imposed on the able-bodied. Mendicancy ought to be suppressed and discouraged by refusing help to street-beggars. Imposture in obtaining relief should be severely dealt with. The safety, itself, of the community, if nothing more, should be protected by severe laws against the "tramps" that now infest town and country in the northern United States.

5. Whether the government of a country, besides assisting its own disabled soldiers and sailors, ought to found hospitals for various ills, as for the deaf and dumb, for the blind, for the insane and the idiotic, for orphans and widows, for the cure and against the spread of various contagious and noisome diseases, will depend upon the amount of permanent endowments supplied by private persons, and on the answer to the question whether government aid will dry up the springs of private charity. It seems to devolve especially on the state to provide relief when deadly epidemics sweep through a land, and to extend their agency to the cure of pests falling on domestic animals. The spread of such diseases the government alone is able to prevent.

6. The prevention of a great part of human suffering is to be sought in higher moral and religious cultivation of individual and of family life. Here we come to the important and somewhat difficult subject of the relation of the state to general morals.

### § 250.

IX. We assume here, as having been proved in the second part of this work, that public law may prohibit and punish acts regarded by the community as immoral, the evil of which extends beyond the individual, or, according to all experience, is likely to extend hereafter. Here it is of small importance to decide whether these classes of immoral conduct are evil in themselves, or only in their consequences; whether they are evil in the use or only in the

The state's duty  
as to public morals.



abuse ; whether they violate an individual right, besides harming or threatening harm to a community, or have only the latter of these qualities. They must injure a community and must be open, outward acts, in order to be brought within the range of prohibited acts; and even if otherwise perfectly innocent, may acquire the quality of injuring the public in certain circumstances and at certain times. There may be nothing harmful to others at ordinary times, if a person smokes a cigar; but self-preservation would require men to stop him from doing it in a depot of gunpowder. Thus, then, in the morality of an action, there is no absolute indication that it is innocent ; in its immorality, no absolute indication that it is always harmful to a community. Yet there is reason to believe that if a practice is immoral, like prostitution, it must be deleterious also ; and the immorality of it in some cases, where a nation is enlightened, will make every one believe at once that it must be hurtful also. Again, an act may be immoral and yet not properly subjected to law and penalty. Thus a lie is forbidden in the family as a wrong act, and it is held that honesty in speech would prevent a thousand evils which falsehood encourages by concealing them. But while a lie in an official person ought to make him, it may be, liable to punishment, a lie in the family would not perhaps in any nation call for the interference of the civil authority. Why is this ? It surely cannot be because *immoral acts*, which hurt *no one in particular but hurt society in general*, ought not to be noticed by law. If that were the case, all kinds of immoral acts which are now prohibited, ought not to be noticed unless a distinct case of personal injury could be pointed out. Nor can it be, because *certain classes of immoral acts* have no tendency to injure society, for there are no such classes. All wrong-doing is more or less harmful. Evil in any form tends to overthrow public safety and prosperity at points where its influence seems to be impossible. But the true reasons are practical ones, and these are, among others : (1) that the evil from certain acts which do not directly violate the rights of others must be

manifest and serious ; (2) that there is strong temptation to it in the habits of the age and country ; (3) that it cannot easily be counteracted in any other way save that of direct prohibition ; (4) that there is no discoverable advantage in allowing the evil to continue,—the advantage from the gains of capital being really of no account, because the waste from self-indulgence in the consumer more than balances the profits of the seller or producer who can use his capital in some other way ; (5) that the evil can be prevented effectually by law, that is, that public opinion will not oppose the execution of such a law, that it can be executed with ease if prosecuting officers are faithful, that evidence can be found of the violations of it, that the better class of citizens will interest themselves in seeing it enforced.

I have indulged in these remarks to show the difficulties connected with this subject, which are sufficiently great to extinguish the contempt that is felt by some for the legislation of past times, which confounded rights and morals. But the order and existence of society would be imperilled, if legislation merely secured rights. And, on the other hand, if immoral acts were forbidden because they might be followed by violation of private rights, that would open a door far too wide. It is true that no wise distinctions were made in any of the old codes between these two departments, and it is true that the ablest men made mistakes in their legislation. Thus, Julius Cæsar had a sumptuary law enacted, although so many had failed before, and found that it fell into neglect ; and yet Augustus followed him in one which fixed the expense of entertainments at a certain small amount, and Tiberius tried to stop the use of expensive utensils.\* But it was so evident that a state, and particularly a small state, could not be preserved in a sound condition while prodigality and corruption of family life were unnoticed by the law, that all early lawgivers felt it necessary to put a restraint on the immoralities of society. And they have been followed in all

\* Comp. Cic. ad Fam., vii., 26, 2. Suet. Jul., 43. D. Cass., lvii., § 15, and for the sumptuary laws in general, Gell., b. 11, ch. 24.

modern states, although as yet no metes and bounds have been fixed for legislation on moral and social questions.\* Nor have writers on legislation succeeded much better. Mr. Mill, who carried personal liberty very far, and holds it to be the highest aim of the state to aid the development of the individual, yet would put the sale of spirituous liquors under restrictions. And I cannot find, after considerable reflection, any definite limits which may not be varied by the habits of society and the dangers of society.

The following limit has been proposed: that any immoral act, which is of injury only to him who commits it, ought not to be the subject-matter of a law. Thus, if a man were not connected with society by any family or other close ties, he might get drunk as he pleased without being amenable to law; but if he is a father of a family, or a minor, he ought to be punished. And so the supplier of the liquor should have a right to sell it in the first case, and not in the second. But may not such a privileged drinker do great harm to the community where he lives, and is not the example sometimes to be considered in penal and police regulations? I can only allude to another vice, which it would shock the community to place on this footing. It is enough to say that none of the great and common vices of society stop short of injuring society. Every vicious man corrupts other men, and helps to keep open the sources of corruption.

We consider it, then, as the conclusion to which all reflecting men will arrive, that among practices, immoral or otherwise, deleterious to society, which can be effectually suppressed by law, those ought to be suppressed, the legislation against which would least interfere with the liberty of individuals, and which are of acknowledged and great evil in a community. Let us see if we can enumerate any such.

\* Moral legislation was the more *necessary* in heathen nations, because heathenism was immoral, or at least its mythology generally was; it is the more *natural* in Christian nations, as supporting the spirit of the religion.

1. Houses of prostitution. Christian legislation, it is believed, has always frowned on such places. The evil in itself is great, as destroying the moral tastes and making it almost necessary that a ruined woman for gain's sake should sell her body. In modern times also, perhaps since the times of the Crusaders, a loathsome disease has infested the world, which spreads through generations the seeds of weakness, as well as degrades the constitution and even the capacities of families. But the crime courts secrecy, and may escape a strict police. Some laws, therefore, would make it decent, and give it a license, prohibiting at the same time all public solicitation. But this is an immoral plan. The vice thus licensed is admitted to be a vice, and thus society becomes a partner. Or, is it enough that those *quæ quæstum corpore faciunt* should be registered and kept in health under a medical police? This secures the health of the community, and so far is a good regulation. But it gives increased safety to those who indulge their passions, and so far tends to increase the vice. Something more seems to be needed, such as the fear of arrest and exposure from time to time on the part of the men who may be found in such haunts. On the other hand, endeavors to reclaim the unfortunate ones who make their homes there ought to go along with severe penalties inflicted on keepers of brothels who make gain out of other persons' sins.

2. The sale of spirituous liquors and drunkenness. Here we have an immorality of the most serious kind, cherished by a part of the community, but which the sober part claim to be a source of evil greater than any other. The scale on which intoxicating drinks are used is enormous; the revenues derived by governments from this source are of the greatest importance; the persons concerned in vending them, as their entire business or a part of it, are more numerous in cities than those who pursue any other trade; many employments could not succeed without adding this sale to their other business, and the most contrary opinions have currency in respect to dealing with this vast evil



of the United States and of other northern nations. There is no dispute as to the magnitude of the evil ; the dispute touches the right, the feasibility of repressing it, and the best way of so doing. As for the right, we need add nothing to what has been said except that a man under the influence of strong drink is a source of constant danger to other men ; and if he is in any employment, may cause disaster or death to those who are near him ; that such a man engages in brawls which may cause the death of even transient persons ; that by strong drink and drunkenness the expenses of a community for maintaining a police, for supporting the poor and the sick, are largely increased ; and that by this means families are degraded and pauperized more than by all others. Society, then, is bound to prevent, or, if that is not possible, to diminish the evil, unless some right of the individual is in the way. But surely no man has a right to get drunk, at least unless he is shut up within four walls, nor then, unless he is isolated in the world and it is certain that his habit will not be a burden to the community. And the sale of strong drink stands on no other ground, to say the least, than the sale of poisons or the sale of violent explosives, or than the allowing of a vicious or mad dog to run at large. If the matter is put on the ground of natural right, either the seller must be in some degree responsible for the evil that he inflicts on individuals, as quack doctors are, or the evil may be prevented, in a measure, by putting the sale under restrictions, or the sale may be prohibited entirely. Let us look at the measures for preventing it that have been advocated, beginning with the prohibition of the sale.

Prohibition has been supported on other grounds besides that of the evil growing out of the sale and use of strong drink. It has been classed with the sale of poisons, because the alcohol unmixed is a noxious substance in the system. It has been said that to touch anything which can intoxicate is a sin on account of the example thus placed before the weak, which, if it were true, would only affect the action of individuals acting in the light of personal duty, but could not

be a ground for legislation. It has been claimed that much of the inferior spirituous liquor is adulterated, which may be true, as it is of coffee, sugar, and even flour. But this, while it calls for police inspection of the articles sold in the shops, does not in itself call for prohibition. The grocer is bound to ascertain, as far as he can, that his articles are what they pretend to be and contain no noxious ingredients. And this will be generally known by the price which is charged to him, and by the reputation which certain sellers or manufacturers acquire. There are also chemical and other tests of spirituous liquors.

Prohibition, then, if the best measure for suppressing drunkenness, must be looked at simply as a means of getting rid of a very enormous evil in society. Is it or is it likely to become an *effectual* preventive? Experience in this country has proved that it is not effectual; it has proved that it can be found in states having the most stringent laws against ardent spirits; that, owing to the divided opinion in the state or in the country, or to some inherent defect in the police; a law against selling intoxicating drinks will be enforced for a time with great strictness, and then a sudden relaxation of vigilance will bring things back nearly or quite where they were before. It of course comes into state politics: more than once the "rum-sellers" have been in the ranks of one party and the "temperance men" in those of the opposite, and quite as frequently the latter have run a ticket, generally an unsuccessful one, against the other parties. The public contests, as in all cases where warm feeling is kindled in benevolent communities towards social evils, have produced fanaticism and the spirit of denunciation. The change in the meaning of words which has followed this movement is remarkable, as indicating at once the greatness of the evil in the minds of a large class of upright men, and their almost necessary one-sidedness. Abstinence is the proper word for total disuse of whatever can intoxicate, but temperance has been thrust into its place; as the word chastity was seized hold of by the ascetic thinking of the early

church, and so abused as to imply that all the married are unchaste.

The result has been that prohibition has been a failure. This was owing in part to the logical extreme to which the prohibitionists went of including in the law all malt, all fermented, all vinous liquors. Those who had lived in their own country on beer and ale were not disposed to submit to such a law, and the wealthy could procure wines in their original packages, in which case state law could not reach it. This made the law seem more unreasonable, and it came to be more difficult of execution. How long these conflicts will go on in the states where they have been on foot for years, we cannot say; but thus far they have failed of accomplishing their object.

There are two other methods of putting a stop to the intemperate use of alcoholic liquors: one that of pledged abstinence, with which we have here nothing to do; the other that of license and police regulation. The system of licenses is liable to two objections. First, it is opposed by those who regard abstinence from whatever can intoxicate as an absolute duty. It is a sin to drink such liquors, and therefore a sin to license them. This is logical, if the premises are good; but they are unsound, if abstinence from any particular article of food or drink is not necessarily a moral virtue, and if every individual's conscience must judge whether in his case an example of refraining from what does harm to others is demanded by his duty to them or not. Christ's conscience certainly did not prescribe rules to himself of abstinence from such articles, although he mingled with persons led astray by self-indulgence, and although the example which he set of "eating and drinking" would certainly influence multitudes of mankind. We conclude, then, that license is lawful in this case because the indulgence is not necessarily immoral.

But, again, if license is not wrong, it may be a small check on drunkenness in practice, and of difficult execution. A license law ought to be guarded and made rigorous by some

such regulations as the following : 1. None ought to be licensed who cannot be trusted in to fulfil the obligations implied in the license ; and any violations should be followed by fines large enough to secure fidelity. 2. Provision ought to be made for examining the quality of all spirituous liquors sold by the licensed venders, and for destroying adulterated and hurtful compounds. 3. There ought to be no access to or from such buildings after a certain time of night, or on Sundays, under penalty or liability of forfeiting the license. 4. Any person seen going from such a place in a state of intoxication, or unable to take care of himself, ought to be arrested; and the keeper of the house should be made responsible for fostering his evil habits. 5. A rule which prevails in some places is worthy of adoption, if it be found a practical one after the tests to which it has been or may be put. It is that, if a wife or a parent traces the intoxication of a kinsman to a drinking house, after notice given to the keeper of the house, the latter may incur a heavy penalty for again supplying his victim with intoxicating drink. Such a rule may be of little use in a community where there are many drinking houses, and the next of kin may be unwilling to give the notice. Otherwise, it would be very effectual. 6. Debts incurred for liquor drunk at the place where it is sold, or carried home from thence, ought not to be recoverable. It must be sold for ready money, or not at all.

One of the great supports of the free sale of liquors is the feeling that personal rights are invaded by any restriction or prohibition. I do not believe that this most ungrounded feeling can ever be done away with entirely, and so the question may fairly be asked whether it ought not to be taken into account in legislation. If it is so strong as to produce marked opposition to a restrictive law, it will have an appreciable force in making such a law difficult of execution. Prohibitory legislation always strikes against this law, particularly when it includes in its list of prohibited drinks malt liquors or vinous liquors, which thousands have been accustomed to regard as harmless in the use. On the other hand,



licenses put a man under bonds ; he applies for a certain permission, and comes under certain obligations when he receives it ; if he does what is not included in the license he cannot complain of the consequences ; others who observe the law will not sympathize with one who tries to increase his business at their cost by his illegality ; and so the license law will not excite much ill-blood as being a violation of freedom. Nor will the power of rejecting unsuitable candidates for a license be a cause of much complaint either in society or among the privileged dealers. Still it partakes of the nature of a monopoly which is odious under free institutions, and it may be so difficult of enforcement and so much disrelished by a portion of a community, that it will become in the hands of the enforcing officers a dead letter.

3. The sale of obscene books and pictures is generally and justly prohibited. Here there is only indirect harm to the community from the evil wrought on the individual, and the moral aim of this prohibition, especially the desire to keep the young from corruption, is apparent. The same is true of indecent exhibitions of the person. It might be asked why immoral books also should not expose the publisher to a fine, and with the more reason because immoral histories of guilty passion, intended merely to please, may be made more seductive than obscene pictures ever can be. Works of art represent the event of a moment, but a skilfully written book can present the progress of wrong desire in such colors, with such excuses, with such representations of the fatality of human beings under temptation, as to work corruption in the soul for a lifetime. But the difficulty of drawing lines here would make legislation almost impossible.

4. Cruelty to animals. We have already had occasion to speak of the laws against this class of acts, as dictated by humanity, by the feeling which revolts against and condemns all kinds of cruelty towards domestic animals, whether it be that of overburdening their capacity to draw or carry, of punishing them savagely in anger, of withholding from them necessary subsistence, of heartlessly neglecting to provide for

them, or of transporting them to market in a way that exposes them to suffering and injury. The reason why men make such laws lies not mainly in the fear lest cruelty to animals may cherish the same feeling towards men, nor in the evils of public shows of cruelty, but in the feeling that the conduct is unworthy of a man, and in the indignation aroused by the sight. Not all nations have had laws against this wrong. The mild Hindoos, especially the Buddhists, taught the evil of killing animals, since their philosophy saw in other living creatures the souls of men. The Buddhists forbade the killing of anything that had life, taught the exercise of compassion towards brutes, and required that old and sick animals should be cared for. But no laws, that I know of, against cruelty to animals, were made by this race. The Hebrews have a number of provisions in their law against improper uses of animals, some of which breathe the spirit of enlightened humanity, while others may be explained on other grounds. The prohibition in Lev., xix., 19, may be regarded as an extension of the law against unnatural crime, and is probably dictated by a moral feeling excited by the uncleanness of bastard animals. In another passage, Lev., xxii., 27, it is forbidden to kill for an offering the young of a cow, sheep, or goat, before it is eight days old; and the dam is not to be slaughtered on the same day with her young. The first of these prohibitions may be explained on the ground that the young animal ought not to be eaten—as at the sacrificial feast—immediately after its birth; the other seems, without question, to be dictated by humane feeling (comp. Knobel, in loc.), and probably, as Saalschütz contends (*Mos. R.*, p. 179), this is true in both cases. The command not to boil a kid in its mother's milk (Ex., xxiii., 19, and in two other places) may be explained in the same way, or, it is possible, had its origin in idolatrous sacrifices of the kind specified. (Com. Knobel, in loc.) The law that the ox and ass shall rest on the Sabbath, may be understood as ensuring the more completely the rest of the owner himself; but that other law, to the effect that the ox which threshes the corn must not be muzzled,

clearly indicates a humane spirit, as if the laboring beast were worthy of the few stalks it could snatch up amid its work. The same humanity appears in the prohibition earnestly enforced (Deut., xxii., 6, 7) against carrying off the mother bird with its young. "By all means let the mother go free, and take the young [or the eggs] to thee, that it may be well with thee and thou mayest lengthen thy days." There may be also in this passage an aim to keep up the species of birds, but the appeal to humanity is sufficiently obvious. And to mention only another precept: when the Hebrew was required to give aid in case the ox even of his enemy had fallen under its burden, this was dictated not merely by a desire of cultivating the fraternal spirit, but also by compassion for the fallen animal.

Such laws are not found to have existed in Greece or in Rome, so far as I have been able to discover, although towards slaves the Athenian code was especially humane. A very singular and trifling provision in the laws of the Alemanni seems to show that the uncivilized Germans were susceptible of pity towards brutes.

5. Gaming or gambling. The fascination of games of hazard is so great among civilized as well as uncivilized nations, that among the former men risked their whole property on the issue, and among the latter staked even their personal freedom. What is commonly called gambling produces the greatest amount of evil to society; but various other sports, the issue of which is uncertain, and on which men risk money in bets, are also of no small injury to society. Such are especially cock-fighting, dog-fighting, and the various kinds of races, as well as pugilistic contests. Some of the races are noble contests, not set on foot for the purpose of staking money on them; but it is found that every game attended with risk, although its aim may be good, is abused for the purposes of the gambler. All these sports and games are prohibited and were prohibited of old, whenever it was found that they were injurious to society. The Roman law forbade gaming for money (*vetita legibus alea*, Hor. Carm., iii., 24, 58), and made

gambling debts unlawful ; it allowed the recovery of money paid to another for this purpose within fifty years. Only at the time of the Saturnalia, and in the case of certain kinds of games which exercised courage and skill, was the law relaxed. (Comp. § 35.) The English law in the time of Blackstone may be found in his commentaries. (iv., 171, 172.) With us, also, gaming contracts are void, and money lost at gaming may be recovered (in some of the United States, at least), by the loser. The reason for these prohibitions, where a right of another may not be injured, lies evidently in the idleness, theft, and debauchery that are apt to attend on gambling, especially among the lower classes, and in the character formed by giving way to a gambling spirit. In other words, it is for moral reasons that the laws are enacted. Whether speculations in stocks, when they have assumed the nature of gambling, cannot be brought under the same laws, may be reasonably asked ; but there are difficulties attending on the execution of such laws, as, indeed, " debts of honor " generally escape the notice of criminal prosecution. It is not difficult, however, to bring within the meshes of the law the keepers and servants in gambling-houses.

6. Laws restraining luxury, or sumptuary laws. To these we have already referred as having been enacted in various small states, but with very little success. The motive is a moral and social one, and is to be commended in itself ; for nothing leads more directly to fraud and various immoralities than the expensiveness of dress, entertainments, equipage, and furniture. When the means of persons in a high social position increase, they raise their style of living ; this leads others, in a country where a general equality prevails, to imitate them, even if they must do so by living beyond their means ; soon commercial disaster and habits of expense take away the power of supporting the style by honest means, and multitudes, rather than endure the shame of falling below their rank, resort to various kinds of dishonesty. But sumptuary laws are not the way to cure this evil, as the experience of Rome showed, and as the nature of the case makes appar-



ent. For, *first*, the opinion of society governs the style of living, in great measure ; and that opinion can either change or abolish the sumptuary laws. *Secondly*, the producers and traders see no evil in the indulgences of people of wealth. They themselves have the same tendency to extravagance, because they do not anticipate evil. All persons, almost, except the political economist, seem to think that enlarged consumption must of course be a blessing. *Thirdly*, the persons who would feel such laws most are best able to ward off the effects from themselves. Acting thus unequally on different classes and having no visible results, they are abrogated or remain a dead letter. A well-devised tax on incomes, questionable as such a tax may be, would produce more effect in restraining expenses than all the sumptuary laws that have ever been made or projected.

Montesquieu has some remarks on sumptuary laws (b. vii., ch. 1-5) which show his opinion in regard to their use under different forms of polity ; on the whole, he seems to find no fault in them where they can be enforced. In a republic, he remarks, luxury is the ruin of the state, and is rendered possible by the increasing inequalities of condition. "In order to have an equal distribution of riches, the law ought to give each man only just what is necessary for nature" (ch. 1). But this plainly would be a fight against nature, which always has been and always will be the author of inequalities. "In an aristocracy which is ill constituted, the wealthy noble is not allowed to spend, and the people have nothing to spend. Greece was wiser. The rich spent their money in ways which gratified the people. Wealth, therefore, was as burdensome as poverty." But we now charge the liturgies and other public services of Athens to the tyranny of the lower people. Injustice, then, must be used to deplete the wealthy. "In a monarchy there is an absolute necessity for luxury. If the rich did not spend largely, the people would starve. For the preservation of a monarchy, riches ought to grow in amount as the ranks of society rise upward. Sumptuary laws did not suit a monarchy at Rome, and luxury is absolutely necessary

in both monarchies and despotisms." But while this is true, it is not all the truth. Sumptuary laws are enacted to prevent or destroy an evil that is already too inveterate to be destroyed. Tacitus (*Annal.*, iii., 53-54) makes the emperor Tiberius say, in a letter to the senate, that "the many laws devised by the men of olden times, the many that the late emperor Augustus had passed—the former becoming a dead letter by being forgotten; the latter, what is more disgraceful, by the contempt they met with—have rendered luxury more secure." The whole series of laws was a failure.

A government may make laws, says Montesquieu, to promote absolute frugality, which is the spirit of sumptuary laws in a republic; or to promote relative frugality, which is effected by prohibiting expensive foreign products that require such an exportation of home manufactures as to cause more loss than advantage. His meaning must be either more moral loss than moral gain, or loss rather than gain of riches. But how crude the politico-economical doctrine here is, if we are right in our doctrine at the present age! If home manufactures are exported, it will be because they are made at a relative profit; and if prices at home rise, the exportation must by and by cease, for in the other nation, or somewhere else, the articles will then be made cheaper. Until that time, the home production will be stimulated and the laborers be employed. And what is meant by *too high* prices? Not, certainly, too high for the importer's ability to dispose of them, nor too high for the nation importing to pay, for then the importation would stop of itself.

And this leads us to the inquiry whether, in the interests of morality, any law endeavoring to keep the inhabitants of a nation from vicious or expensive indulgences ought to be passed. The answers may be twofold: 1. The modern plan of laying duties, not equally on everything, but unequally, so as to derive as large a part of the duty as possible from expensive articles used only by the rich, has proved so successful and is so unobjectionable on principle, that probably it will never be abandoned. It imposes

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a considerable burden on articles of great expense, which will not, within reasonable limits of taxation, be reduced in demand. Those who want silks and costly wines will not fall off much in number, if the duty rises one-quarter; while an equal increase of duty on articles in general use might greatly diminish the call for them. Or, if they should fall off to such an extent that the raised tariff occasioned no increase of revenue, no harm would be done. 2. On the other hand, the use of a tariff for moral purposes directly is exceedingly questionable. There are immoral books and pictures. Shall these be prohibited? If so, we must have a new kind of inquisitors in the world, or the state itself must make an *index librorum prohibitorum*. The books and pictures, moreover, would acquire a new value from the very prohibition. Or shall we have regulations tending to decrease expense and increase frugality? Here new difficulties arise which will require that the private affairs of every individual shall be scrutinized, and a limit set to consumption, as, for instance, by a tax on consumption, which no dealer or producer would bear. 3. All, then, that can be done to put an end to "luxury" with any success, must proceed from private persons who are wealthy, or from some change in public taste and morals.

7. In closing these remarks on legislation for the promotion of morality, we may ask whether there are any cases where the state can *enforce* moral duties; and whether its whole action under this head is not limited to the *prevention* and punishment of immoral acts. I believe that this is all the state can do; it being understood, however, that in the term *immoral acts* is included negligence, or failure to do what morality demands, such as thoughtless exposure of the person. It may be that in some small states, where the community was little more than a large family, the laws undertook to go quite beyond this; but certainly, in large communities, more than this would be nearly impracticable. Ingratitude towards parents, we are expressly informed, was actionable at Athens, and it also exposed a man who was drawn to hold office, to be rejected when his qualifications were examined

(Xen., Mem., ii., 2, 13), which, however, was merely an act of self-defence on the part of the people. The action referred to by Xenophon can be no other than the public suit of ill-usage towards parents (*κάκωσις γονέων*). This could be brought against children who abused their parents by word or deed, when they refused them food, being able to provide it, and when they refused to bury them. The first of these acts implies more than immorality; the second, on account of the close family tie, may be looked on as almost a violation of right; the third was not only ungrateful, but irreligious. It is said also that in the mutual aid societies at Athens this action of ingratitude could be brought against a member. This kind of suits is a very obscure subject; but if there were a suit answering to this title; it could be explained on the ground that the mutuality in those clubs conferred an obligation upon each of the persons benefited.\* The only thing that I know of in Roman law which looks like the treatment of ingratitude as a wrong to be estimated or punished, is a provision of the *lex Ælia Sentia*, passed in A.D. 3, which gave the patron the right—besides that of relegating the freedman beyond the hundredth mile from Rome (Tac., Annal., xiii., 26),—of accusing him *ut ingratus*. This law then qualified manumission; and the duties owed to the patron almost turned into claims.†

\* Comp. Meier u. Schoem., Att. Proc., pp. 448, 449; and for the suits against members of the same *ἐπavos*, K. F. Hermann, Gr. Staatsalt., § 146, 9.

† Com. Dig., xl., 9, 30. For ingratitude as a ground of public prosecution among the Persians, comp. Xen. Cyrop., i., 2, 7. The laws of Manu lay a fine on one who forsakes father, mother, wife, or son, viii., 388 (p. 281 of Houghton's ed. of Jones's transl.). The *in-officiosum testamentum* (§ 48), as defined by J. Paulus, Sentent., iv., 5 (in Huschke's Jurispr. Antejustin.), is that which, "*frustra liberis exheredatis, non ex officio pietatis videtur esse conscriptum*." It is the want of *pietas*, as in the case of a freedman, which constitutes the injury to the natural heir.



## CHAPTER XII.

### THE STATE'S RELATIONS TO RELIGION.

#### § 251.

WE come now to an important and difficult subject, on which the opinions of almost the whole past, since states were founded, differ from those which are entertained at the present time by large numbers of thinking persons, and by nearly everybody in this country. In another part of this work (§ 76, § 78, a) we have tried to show that, for the same reason for which the state furnishes education to children and seeks to promote morality, not only the protection of religion, but even the establishment of a state church can be defended, provided, however, all the people be allowed the free exercise of their worship, according to their preferences. Yet we added that while a state can get along very well with such a national church when all are of one way of thinking, dissent will inevitably creep in, if an age ensues when men speculate and debate on religion, and then the religious establishment may struggle for its life, and the struggle may imperil the interests of the state or of religion itself. The safest way, therefore, of dealing with religion at such a time, is to leave it entirely to itself, and in some few countries no other adjustment of relations is possible.

That which gives this question its great weight among questions touching the duty and policy of the state, is the importance of religion as a power in the state and in the life of man, and the attachment which multitudes of persons feel for their religion. It was no overestimate of the Romans, which in the phrase *pro aris et focis*, made religion and the family stand for the objects that are most worth defending. The heathen valued their religions because the stability of earthly interests was found in the protection of spiritual

powers ; state, family, and individual alike, feeling need of such protection. Nor was it divine power to protect, and fear of divine wrath, if unpropitiated, that alone led to worship ; but worship was natural, a natural want, as necessary as human society. To this the Christian religion adds the conviction that it reveals the perfection of character, and the means for attaining together to a perfect character and a harmony with God ; and that the state perceives such a character, formed by religion and by religion only, to be as necessary to make the citizen a perfect citizen, as the man a perfect man. The state reaches its highest aims only by something that lies out of itself, and thus seeks to get all the aid possible for itself from this source.

In considering the relations of religion to the state, we shall divide the religions into three classes. The first class may comprise those which were made up chiefly of worship, external forms, and mythology, which had no vital connection with political institutions, and expressed a part of the truths of natural religion in a polytheistic form. Most of the heathen religions belong here. Another class of natural religions consist of such as are organically connected with the state by means of institutions of sacred origin. Here belong the religions of caste and hereditary classes—the Brahminical and Egyptian—the religion of Iran, and perhaps that of the Druids in the Celtic race, with the Mexican and Peruvian. In the third class may be included Judaism, Mohammedanism, and Christianity, the three monotheistic systems of the world. The *first* class of polytheistic religions, apart from some hoary myths, took their form in the mythological age in the countries where they grew up, or else were borrowed in part from surrounding nations. These mythologies contain in themselves very little which the state could make use for its purposes of political training. The *second* class consists of those which moulded or transformed the states where they flourished by means of religious institutions. These have the most intimate connection with the state, but were on that account essentially local. Brahminism, for instance, could not

spread much beyond India, because, to introduce its institutions, would require a complete remodelling of society, which existing interests would oppose ; while Buddhism, having no such fixed institutions, was able to spread over various races. In the *third* class are embraced three religions which spread chiefly by ideas of the spiritual world, and could be combined with any political forms ; thus, Judaism in the course of time had several political forms, and could propagate itself in various parts of the earth. But they differ greatly in their diffusive nature and power of associating with different political ideas. Judaism kept the descendants of Jacob together by its faith, its rites, and the religious centre which its rites required ; but has kept its ground in the world as much by the hardening influence of persecution, and the brotherly feeling between its members, as by its own vital power. Mohammedanism has something of the same character. It is somewhat diffusive and somewhat capable of combining with various polities, yet has had an inclination towards despotical government, and thrives best not far from the place where it had its origin, and where its pilgrims turn their steps. Christianity, throwing off the fetters of place by its sublime doctrines of a universal Father, and a Saviour for all mankind, can subsist under every form of government. Overturning nothing, it transforms everything. Hence its infinite richness of manifestation. With almost no philosophy, it gives birth to manifold philosophies and theologies. With the simplest possible institutions, it can enter into union with a great variety of institutions. With a certain number of fixed moral and religious verities, it gives birth, in connection with human reason, to a large number of sects, which, as men are, have been unable to subsist side by side in peace. These sects are multiplied by the claim of possessing the only true Christian faith or institutions. Thus, under Christianity, the problems which the state has to solve, according to the principles on which states have acted, have become more complicated than those of any other religion, owing to the freeness of its development.

There is another point in which the monotheistic religions differ from others, and in which Christianity stands foremost among them ; it is the profound conviction, which those have who receive them, of their being true revelations. They claimed to be true, and they satisfied believers in them in regard to their relations to God and the universe. Judaism was introductory and propædæutic ; Mohammedanism borrowed from it, with some adaptations and variations. But Christianity professes to rest on a historical basis vouched for by original witnesses, and to be the final word from heaven concerning sin, redemption, a perfect rule of life and a life hereafter. Being intensely moral by its hold on the conscience, it leads men to withstand all wrong laws, to oppose institutions that are opposed to its spirit, and with equal firmness to contend for whatever is true or believed to be true, and to accept of death rather than be disloyal to truth. Thus Christians may come into contact with state law, and either persecution must arise or law be modified. But beyond this Christianity has been exposed to various corruptions in outward form or in doctrine, and the essential truth has carried over into the form or into the unessential doctrine the sanctity and divine authority of revelation, so that sects arising within this simple religion have claimed exclusive right to represent it in a given age or country. Thus, an outward institution, especially if intended to secure the unity of the Christian religion, claims exclusive right to exist, and by its influence on the state seeks to destroy all others. There are indeed a few phenomena like this in the history of other religions ; thus, Brahmanism expelled Buddhism from India in an immense conflict ; the traditions produced divisions in Judaism ; the Sunnites and Shiites break Islamism in twain ; but the phenomenon is of more frequent recurrence within the Christian pale, because it quickens thought into new vigor, and makes the conscience more imperial than any other religion. For these and other reasons the relations of states to religion, the encroachments of religion on states, the difficulties of rival sects with each other and the law, have



been complicated and destructive of political and of social peace.

Yet again, most religions have found it necessary to hold property for the various expenses of worship and the support of priests. Among the Jews this had been the practice, and it was natural that Christianity, which is built on Judaism, should follow it. Acting on a purely voluntary system at first, while as yet not acknowledged by the state, Christianity, when it became a lawful religion, adopted the existing usage of accepting property bequeathed or otherwise given for the support of its religion and its officers, as well as for various charitable purposes; which property was held by the bishop of the diocese, for the most part, as the representative of the church. Thus everywhere large properties came into ecclesiastical hands. Moreover, the bishops, or the heads of monasteries, who controlled the great property of the monasteries independently of the bishop, became holders of land by a feudal tenure, and thus were invested with jurisdiction, and assumed (in person or by a vicar), all the obligations of feudal service. Add to this that lands were devoted all over Europe to the support of parish priests, on condition, more or less, that the owner who had thus given his land for pious purposes should have the right of nominating the incumbent, subject to ecclesiastical law. And in addition to all this, when, amid the confusions of the decaying empire, Christian law and the bishops remained as the chief bulwark of society in the towns; the latter gradually gained jurisdiction in all the parts of law where *jus*, morals and religion have common territory, such as marriage, divorce, legitimacy, and even wills. From this source a large and most important branch of law came into their hands, which the states did not recover until the modern period. The clergy also acquired to some extent the right of being judged by a different law from that of the other members of the political body, or at least by judges of their own. There arose a voluminous *corpus* of canon law, partly founded on the Bible, partly on the civil law. Closely joined to this system and the very soul of it,

was the doctrine that the bishop of Rome, as the representative of unity in the church, and the interpreter of its doctrines, was the supreme arbiter, with power to issue orders enforced by church censures, whenever morality and civil right seemed to conflict. In these ways, it is plain, the power in the church and the power in the state could not fail to come into collision. The whole of the middle ages is filled with the manifestations of this strife. The relations of the parties were most complicated and difficult. The claims which the mediæval church made, though held in abeyance, have never been wholly abandoned by the Romish church. When the Protestant churches were formed, they inherited some of the questions growing out of old relations and old opinions, and these are still to a certain extent unsettled.

### § 252.

We return to the division of religions which was given above; and propose to consider *first* the relations of religion to the state in the lands where it had no amalgamation with the body politic, and little corporate or direct power. In polytheistic countries, the exclusiveness of a particular kind of worship could not well go beyond the old possession of special shrines, and of lands given to temples for the worship of certain gods, the established public rites, and the traditional worship and shrines of the clan or of other subordinate divisions of the people. Where a form of worship had a footing, it was protected by the state; but a new and imported religion had no rights of its own. At Athens, however, there was a considerable toleration of novel divinities, unless danger was apprehended from secret unions or mysteries. At Rome, religious police, if it may be so called, was much stricter; and the people, being a religious—even a superstitious people,—the necessity of honoring the gods, the fear of their displeasure, had great influence until the decay of the republic. Among the points most worthy of notice, we mention *first*, that worship was established in this sense,

Relations of state to religion in heathen lands, where it had little corporate power.

Especially at Athens and Rome.

that normally the divinities had a right to be publicly honored, a right which was derived from old usage or positive law. A number of Greek divinities and the Magna Mater of Asia Minor were introduced by law in historic times ; nor was it until the decline of the republic, when strangers crowded into Rome, that the Egyptian Isis and Serapis, the Persian Mithras, the *virgo cælestis* of Carthage, and the Sun, began, without law, to become naturalized in the older Roman dominions. The principle in regard to new gods is expressed by Cicero in the prohibition of separate worship, and of the private *cultus* of new or foreign divinities, unless publicly sanctioned (de leg., ii., 8, 19). Julius Paulus again (Sentent., v., 21), in the time of Alexander Severus, decides that "those who introduce novel and as yet unknown religions, by which the minds of men are stirred up, are to be exiled, if of respectable standing, and capitally punished if of humbler condition." At a much earlier date, about 425 B.C., in a time of drought and pestilence; when, as Livy says, in all the streets and chapels foreign expiations were practised; the ædiles were ordered, perhaps for the first time, to see that no gods should be worshipped and no rites employed but Roman ones (iv., 30). Still more remarkable is the same writer's account (xxv., 1) of public and private rites afterwards brought in by soothsayers and sacrificers, and of women in crowds, even in the forum and on the capitol, making sacrifices and praying in ways unknown before. The ædiles are blamed for this, and a special commission was given to the city prætor to repress it. This occurred during the war with Hannibal, and is one of many illustrations of the tendency of outlandish rites to appear, like new medicines, in pagan countries in their times of pestilence and calamity.

The forms of worship, also, especially of public, were watched over by pagan communities. No one seems to have been allowed to innovate in this respect, as the way of approach to the gods was thought to have had their sanction. In Greece the oracle at Delphi served as a kind of regulator in regard to religious *cultus*, both as to the objects and the forms. New methods of worship, especially of a secret kind,

which partook of the nature of mysteries, were suspected. The energetic action which the Roman senate took in relation to the Bacchanalia, on their appearance at and around Rome in A.U. 568 (B.C. 186), was dictated and justified by the immoralities of night meetings where both sexes were present, but it was of a piece with the whole system. Here, again, the Athenians were more careless than the Romans, as the repeated mention of foreign rites, of secret orgies in honor of foreign gods not publicly recognized, testify. In other parts of Greece less visited by strangers, there may have been more strictness in keeping out foreign rites.

The gods, as beings protecting the state and acknowledged there, had their rights and could not be offended with impunity. The due services must be performed towards them by the public priests. Their temples and everything deposited in them must be treated as sacred; no impure thing like magic was allowed to attend religious ceremonies; the mysteries must not be profaned.\* As faith in the existence and providence of the gods was considered to be necessary both for public morals and to secure their good will towards the state, atheists and scoffers might be punished as doing the state an injury, and as offending against the protecting deities. I have not found any instance where atheism or blasphemy was visited with penalties at Rome, at least before the settlement of Jews and Christians there, of which we shall speak by itself. Such things seem to have been rare until the Romans learned them from Greece; and then unbelief grew so fast in the upper classes that it was no time to keep them down by law. But sacrilege, the disclosure of religious secrets, and the violation of sepulchres, seem all to have been punishable by law. The first of these crimes was regarded as a very high one, but it is doubtful whether it did not include the stealing of private money deposited in a temple.† At Athens the crime of *ἀσεβεία* comprised a great variety of

\* Comp. Schoem., Gr. Alt., ii., 140 and onw.

† See Rein, Criminalr. d. Röm., p. 694, note.



offences, among which may be named atheism, denial of a providence of the gods, ridicule of the divinities acknowledged by the state, profanation, neglect and derision of the sacred festivals, offerings, and games, departure from usage in making offerings, injuries done to altars and temples, and violation of the right of asylum belonging to them, profanation of graves and neglect of duties towards the dead, scoffing at mysteries or revealing them to the uninitiated, rooting up the sacred olive trees, intercourse with persons defiled by homicide, and the entrance of a murderer into a holy place.\* Another crime against religion, sacrilege (*ἱεροσύλια*), seems to have been viewed in two lights, as a desecration of a temple, or as the abstraction of sacred property. In the worst form it was punished with death, confiscation of property, and prohibition of burial in Attic soil. The vague crime of impiety was visited with no absolute penalty, but the accuser and the court might estimate it as high as loss of life. It is highly interesting to find the Athenians punishing opinions, and that accusations were made against many of the philosophers. Thus, besides the well-known case of Socrates, Anaxagoras is said to have been prosecuted for teaching that the sun, then still regarded as a living divinity, was but a fiery mass of stone. Protagoras, Aristotle, Theodorus Atheus, and others are said to have sustained similar prosecutions for impiety. And it is remarkable that, with this censure of serious opinion, great license was allowed to the comic poets of putting the gods in the most ridiculous light, and even of introducing them on the stage in the most censurable and immoral parts of the national mythology.

Towards the end of the Roman republic, Jews began to frequent the capital, and soon Christians also came there, who at first were confounded with Jews. They both were called, in popular language, through the eastern provinces, atheists, either as having no visible object of worship, or as rejecting the gods of the heathen among

\* These are enumerated by Meier u. Schoem., Att. Proc., pp. 300, 301, whose words I have for the most part translated.

whom they lived. Both religions were, as yet, without the protection of the law, and the adherents of both were spread through the empire. Both, by their exclusive monotheism and aversion to idolatry, rebuked and called forth the hatred of the populace; while the meetings of the Christians at the love-feasts and the Lord's supper gave occasion to malicious stories of grossly sensual practices in secret. The Jews, moreover, were glad to divert the ill-will of the populace against themselves by joining in the outcry against the Christians. Add to this that the policy of Augustus and his successor was to keep out foreign religions, strolling astrologers from the east, and practisers of magic as much as possible. Tiberius, it is said by Suetonius (vit. Tib., § 36), "checked foreign ceremonies, both Ægyptian and Judæan rites; the adherents to these religions being forced to burn their superstitious vestments with the utensils of their worship." Jewish young men (at Rome) were sent as soldiers into unhealthy provinces, and the other residents of the same nation \* he sent out of the city, threatening them with slavery unless they obeyed. When the Christians were persecuted, the old practice of forbidding *religiones illicitæ* seems to have justified doing this at first. Afterwards, from the well known letter of Pliny to Trajan (Epist., x., 97), we find that a special edict had been issued against *hetæriæ*, brotherhoods or unions, so called in a Greek-speaking province, and answering to *sodalitates*, also frowned upon at Rome. (*ib.*, x., 43.) Thus political suspicion must have been one ground for the persecution in Bithynia, under one of the best emperors. A little before this time it would seem as if *atheism* itself, *i. e.*, Judaism, including Christianity, had become a crime, for Dio Cass. tells us (lxvii., 14) that under Domitian, A.D. 95, the death of Flavius Clemens, then consul, and the banishment of his wife Flavia Domitilla, were procured by the tyrant "on the charge of *atheism*, on which charge many others were condemned

\* "Reliquos gentis ejusdem vel similia sectatos." The last words seem to refer to proselytes, not Jews, but of similar faith.

who had fallen into the habits of the Jews." The increasing bitterness towards the Christians was due mainly to their increase of numbers and the dread of their becoming a power in the state ; and their persecution was facilitated by the hatred to which they were subject.

Another point at which the religions of the heathen touched the laws of the communities, was the status of the ministers of public worship. In Greece the priest was subordinate to the state, whether chosen or hereditary, and little more was done by the law than to protect existing usages. At Rome the principal colleges of priests were chosen by election or by coöptation. The pontifices, especially the pontifex maximus, may be said to have been the inspectors-general of whatever took place in the public worship.

For the expenses of public religion, including the outlays for building and repairing temples, the games, processions, and public sacrifices, the salaries of priests and of other religious servants, great sums of money were required. These came at Athens from the public treasury, from the rents of religious property, or, it may be, from the liberality of the rich.\* At Rome the management of sacred property, as the renting of land belonging to the gods, was in the hands of the censors. It is remarkable within what strict limits the power of acquiring property by legacy or bequest for temple uses was kept at Rome. No god can be made an heir, says Ulpian (frag. xxii., 6, in Huschke, u. s., p. 501), except those whom it has been allowed by decree of the senate or constitutions of the princes to make such. He then names eight gods through the empire that had in his time the privilege, only one of whom, Jupiter Tarpeius, had his temple at Rome. The property of the gods was devoted to the objects of *cultus*, and is to be distinguished from the money devoted by the community to matters connected with religion, as the wages of the attendants of the priests, the salaries of the vestals and of priests who received salaries. These public expenses were

\* See Boeckh, Staatsh., ii., 12, and for Rome, Mommsen in the new Handb. d. Röm. Alterth., ii., 1, 58-69.

eked out in the imperial times by admission fees into the temples, to the altars, etc. Every priest or college of priests seems to have had a private treasury. On election into one of the honorable colleges of priests wealthy men sometimes paid great contributions.

It may be said in summing up, that the relations between religion and the state brought religion in the most cultivated nations of heathenism completely under state control, that there was an inspection over all religious rites, public or private, and that every new worship needed state authority for its celebration if it would escape the penalties of the law; and that, notwithstanding the absence of definite religious views and of instruction respecting the divinities to be worshipped, public rejection of the gods of the country was a criminal act, and that mere opinion such as atheism was to some degree visited with penalties.

If we were to treat our subject on a larger scale, various shades of practice in regard to foreign religions and in other respects would appear in the usages of other countries. Thus, China is perhaps the most tolerant, and has the most economical state religion of all the nations. The emperor is the head, the intermediary between the people and heaven, to whom it pertains to offer to heaven the great annual sacrifice. As for the rest, there are connected with the religion no temples, priests, nor festivals. Toleration is due to indifference. The Tao doctrine, and Buddhism, which is widespread among the people, are only endured, if we are not deceived, without having any legal standing; and the latter has been at times persecuted. So Christianity, if it should spread, would be exposed, as the religion of powerful nations, to persecution, in case the suspicion of the government should be excited.

### § 253.

2. In the religions of caste, the ministers of religion occupy their places by a law of hereditary descent, and their rights are so imbedded in the state that both must exist or perish together. They stood in India at

Religion and state  
in lands of caste.



the head of the castes, with no other power than that which the religion and faith in it gave them, acknowledged by the warrior caste,—in whose hands was all the force of society as superiors, yet forming a league with them to govern the social system. The Kshatriyas, say the laws of Manu, cannot prosper without the Brahmans; the Brahmans cannot rise without the Kshatriyas; united, the priestly and military classes rise in this world and in the other. (Laws of Manu, ix., 322.) These laws abound in exalting the Brahmans, in giving them privileges above the military class from whom the kings proceeded, in regarding them, apart from their religious functions, to be deserving of the highest reverence. “Instructed or ignorant, a Brahman is a powerful divinity, just as the fire consecrated or not consecrated is a powerful divinity.” “Even when they give themselves to all sorts of mean employments they ought to be constantly honored, for they have in them something eminently divine.” (Ibid., ix., 317, 319.) As, besides this innate pre-eminence of birth, they had the sacred books in their hands, with all the multitude of religious performances necessary to prevent the effects of ceremonial uncleanness in this world and after death; as in the law religion and political duties were indissolubly united; as they monopolized philosophy, speculation, and the knowledge of ascetic discipline, it is not strange that they could keep their control in India for thousands of years and through many revolutions of society. The kings do not seem to have been specially jealous of them, but an alliance subsisted between the two higher classes for the government of the two lower and more numerous. Their position under the laws made them, when guilty of crime, subject to lighter punishment, and subjected others who injured them to a much heavier condemnation than would have fallen on their heads. The king is warned to avoid irritating Brahmans by taking their goods, “for once irritated they would destroy him on the spot with his army and equipage by their imprecations and magic sacrifices.” (Ibid., ix., 313.)

Much the same may be said of the Egyptian classes as of

those in India, although the system did not have the same cohesive strength. It is remarkable also that the Celts in their Druidical system were on the same path which the eastern nations followed. "The Celtic priesthood," says Momm-  
 sen (Hist. of Rome, iv., 274, Engl. transl.), "or corporation of the Druids, certainly embraced the British islands and all Gaul, and perhaps also other Celtic countries, in a common religious-national bond. It possessed a special head elected by the priests themselves ; special schools, in which its very comprehensive tradition was transmitted ; special privileges, particularly exemption from taxation and military service, which every class respected ; annual councils, and above all, a believing people. It may readily be conceived that such a priesthood attempted to usurp, as it partially did usurp, the secular government ; where the annual monarchy subsisted, it conducted the elections in the event of an interregnum ; it successfully laid claim to the right of excluding individuals and whole communities from religious and also from civil society ; it was careful to draw to itself the most important civil causes, especially processes as to boundaries and inheritance ; it developed an extensive priestly criminal jurisdiction, which was co-ordinate with that of the kings and vergobrets ;\* it even claimed the right of deciding on war and peace. The Gauls were not far removed from an ecclesiastical state, with its pope and councils, its immunities, interdicts and spiritual courts, only this ecclesiastical state did not stand aloof from the nations, but was on the contrary pre-eminently national."

### § 254.

3. We pass on to consider next the relations between religion and the state in the three monotheistic religions, which, while they differ much between themselves, have much also in common. As for the Jews, this relation is by no means explained when we call their gov-

Religion and state  
in the monotheistic  
religions.

\* This was an annual magistrate of the Aedui, who had the *jus vitæ et necis* in his hands. (Caes., de bell. Gall., i., 16.)

ernment a theocracy, for a theocracy can exist both where religion and the state are distinct and mutual checks, and where they are blended and fused together (comp. § 163). There was, in their system, no caste, properly so called, and no superiority of the priestly tribe. This, indeed, owing to its dispersion through the land, could acquire no other predominance in state affairs than its intelligence and office of directing all religious services would give it. The judges seem to have been in part Levites or priests, and in part elders from the other tribes. The support of these ministers of religion came from Levitical towns and their suburbs, from tithes, and portions of victims offered in sacrifice. They were checked and balanced in their influence by the prophets—a body representing the immediate, as opposed to the statutory will of God, and who might belong to any tribe of the people. As for the action of the civil power, as distinguished from the ecclesiastical, in religious matters it was chiefly confined to the punishment of offences against religion as laid down in the Mosaic laws, such as idolatry, witchcraft, magic arts and blasphemy, to the general protection of religion and to voluntary munificence, like that of David and Solomon in establishing the temple worship. Of special importance for binding the people together was the rite to which every male child was subjected, together with the obligation to partake in the three great annual festivals, and, in other ways, to acknowledge Jehovah. By these associating forces, by their monotheistic religion with its universal ideas, by their history reaching back to Egypt and marking them out as the people of Jehovah, they kept up their national feeling amid and after many lapses. They deserve the name of a church—which is often given loosely where it has no fit application, as to Brahminism, and even to the Chinese national religion.\* And the combining elements of Judaism are so strong, especially the possession of such a book as the Old Testament with its universal ideas, that in their dispersion over the world, when

\* Thus Wuttke, in his *Gesch. d. Heidenthums* (part 2, § 113), uses this word.

a great part of their worship necessarily ceased on account of its local character, they have kept up their national feeling and worship until the present day.

If, in the Jewish religion, state and church were closely united, much more was this the case, in some points, among the Mohammedans. The head of the state here was both Caliph and supreme Imam, both civil and ecclesiastical successor to Mohammed. And if it had been possible to preserve civil unity for ages, such concentration of power, with the help of a fiery zeal urging on to war against unbelievers, might have endangered all Europe as well as Asia. But the dispute as to who ought to be the successor after the assassination of Othman (A.D. 655), with the subsequent murder of Ali and his son Husein, led to a permanent division between the adherents of the house of Ali, descendants of the prophet, and the successful party of Moawiyah. The Shiites, Ali's party, in the course of time broached the most extravagant ideas respecting the rights of the Imam belonging to Mohammed's line ; he was appointed by God ; blind obedience was due to him, whatever might be the character of his commands ; he was almost a supernatural being. This union of temporal and spiritual power, checked by heretical sects dividing the empire, by the fanaticism of the dervishes, by the corporation of the Ulemas, having a leading voice in religion, science, law, and education, and through their explanations of the Koran, is the all-embracing principle of Mohammedan institutions. The religion has nothing in it to kindle love, appealing as it does chiefly to the greatness of God ; but its simple rites, with its monotheism, its faith in Mohammed and the Koran, give it an existence independent of the state, so that when simply tolerated it can manage to live. Towards idolatry, Islam is intolerant, and has no scruple to root it out by the sabre ; but, having the same faith in one God with Jews and Christians, holding Moses to be a prophet and Christ higher than a prophet, it finds no difficulty in allowing the monotheistic part of its subjects to live in the enjoyment of their religions under its sway.



We now come to Christianity, which, at its origin and long afterwards, was opposed by the might of the empire ; and, as far as Christ and the apostles were concerned, was never conceived of as needing the assistance of the state for its maintenance or propagation. Being built upon two simple rites, one of which is merely an expression of faith in a divine Redeemer, having thrown off all that was national or exclusive in Judaism, and bringing precious promises and supports to the soul of man, it was capable of spreading on every side, of attaining to the rank of a universal religion, if only tolerated or even not rooted out by persecution. Its peculiar truths were few in number, and yet of such breadth and vastness that speculation in different conditions of human thought could reduce them to no one philosophical form ; hence, as we have said already, conflicting opinions arose, causing divisions in the Christian body between the orthodox and the heterodox. Its principles of association also were in the times of the apostles exceedingly simple ; all Christians were felt to be one in Christ, yet, by a free development, it had grown, before it was tolerated in the Roman empire, into a religion with orders of clergy and the beginnings of an outward union between different parts of the world. As questions of church order, like questions of doctrine, could be variously apprehended, here again there was room for discussion ; but in the early ages these were in the background, the tendency was towards outward unity under one head, only that as one body of churches separated on dogmatic or other grounds from another, this outward unity was dissolved. Thus, the Greek, Latin, Nestorian, and other churches arose ; and in the Latin the power of the bishop of Rome became predominant. The Reformation brought on other separations in the west ; and the question of church order now became an important one, some contending that a definite form of church government is taught in the New Testament, others that additions not inconsistent with the best interests of religion can be made in each land. So also, among protestants several kinds of church government

State and Christian religion at first.

appeared, which again divided Christians, and the leading contentions now were those touching the right of separation. Again, when the order and discipline of churches was settled in various protestant lands, the prince, as representing the people, took the lead in the work. New establishments came into the place of the old, and dissenters, objecting perhaps in nothing save points of order, complained that they were not tolerated. Hence, discussions arose as to the right of free worship, and the relation of the state to the church; and this question touching the outward side of Christianity, which for some ages has been ever rising in importance, is now more interesting than any other.

This brief sketch seems to show the richness and vitality of the Christian religion. Beyond its simple elements of faith it can thrive and bless the world under various modifications of doctrine, but refuses to be kept in any strait-jacket of theological statements that will continue to bind through the ages. Its simple rites have been taken hold of and interpreted on the slenderest grounds into astounding miracles. Such is its largeness of heart, that it can edify and purify many, whether they put the simple or the mystical interpretation on the sacraments. It subsists under any form of church order, and beautiful Christians appear in the society of Friends, where there is no church order. It has been a blessing in those countries where it is governed by the state, as well as where it is independent of the state; but the question is whether it would not be a blessing to the world in a higher degree, if disconnected from the state—nay, whether both church and state would not fulfil their ends better, if they discharged their offices without partnership, each freely acting for itself.

From what has been said of the attitude of the pagan Roman emperors towards religion before Christianity was authorized, it would seem quite natural for the later emperors, after Constantine's profession of Christianity, to pursue a similar policy in a contrary direction. If the Christians had been punished as atheists, or as holding unlawful assemblies, the heathen might, when the Christian

Treatment of Christianity by Christian emperors.

state was strong enough to do it, be punished for idolatry, they might be put outside of the protection of the state, their temple lands might be confiscated ; while, on the contrary, the churches and other religious institutions might be allowed to receive endowments. So, again, as the distinction had been made between lawful and unlawful pagan rites, a similar distinction might now be made between orthodox and heretical Christians. And as certain bishoprics had political influence, and the laity had a voice in the elections, it was not strange that the prince or sovereign, especially when the laity dwindled in intelligence or numbers, should acquire the right of giving or withholding a confirmation of clerical and popular choice, either as being responsible for public peace and order ; or as representing the laity ; or as following the example of the heathen emperors or the Jewish kings ; or as suzerains, after the feudal system was matured and included church dignitaries with vast possessions and jurisdiction. Nor was it at all strange, in the time of decay and reconstruction, that the bishops in many of the towns, being the most enlightened and venerated men there, should acquire political and judicial power, first in certain classes of cases which had to do with religion and ecclesiastical law, then as heads of towns, as the officers next to the kings. But, to pursue this train of thought no further, we may reduce the relations of church and state to the following possible forms :

### § 255.

*First*, to that in which the state is absorbed in the church or pure theocracy. As the church never claimed such a relation to temporal affairs, but always conceded the right of the state to a separate existence, we may pass over this relation with a single remark. If the church and state could have been united under one head, the strict theocracy thus constituted must have been universal. There could have been no Christian states, but only one state reaching as far as Christianity was embraced. But the words of Christ, "who made me a judge or a divider over you,"

Theories of relation of Christian church to state.

and "my kingdom is not of this world; if my kingdom were of this world, then would my servants fight that I should not be delivered to the Jews," together with the obvious freedom of soul and intelligent thought inspired by his religion would have come into opposition to the central despotism. With these opposing forces the spirit of nationality would have made common cause, and the despotism or the religion with the national feeling would have been overthrown. We may say, then, that a strict Christian theocracy, an absolute consolidation of church and state was impossible.

The *second* form of relation between the two is that of co-existence in a condition of separation; where, however, the church power claims some decided pre-eminence over the state, as having the most important interests of men in its hands, and the state becomes practically dependent.

Under a *third* form the church is politically dependent on the state, as an establishment by law, with or without the toleration of dissenters.

A *fourth* form appears where the church and the state are in great measure independent, except so far as the church, like any association, is protected in its rights by the courts and laws, or the rights of others are defended from its aggressions.

5. A French writer, Prof. A. Franck,\* proposes another form, in which the state, and a church or confession, form an alliance or concordat: the confession, through its hierarchy at least, taking the oath of fidelity to the state, and thus becoming pledged against receiving from abroad, on any pretext or in any form, any order or decree contrary to the laws of the country, and for which permission has not been first received; while the country through its authorities engages not to intermeddle in the spiritual affairs of the confession, and to give it protection. This is demanded for the security of the state, especially against new or unknown religious societies, but the author would extend the plan to all that exist in

\* Philos. du droit ecclésiastique, part iv., chap. 4., 20-36.



the country. It was also the plan adopted by Napoleon I., in his concordat with the Pope, and in the arrangements of 1806, by virtue of which the Jews in France were admitted to new privileges. Of this plan we have nothing to say, save that if it were adopted, the confession to which it applied might afterwards be altogether independent of the state; so that it would really establish no new relation, but only provide for such guarantees upon entering into its relation of independence, as the security of the state was supposed to require.

1. While the ecclesiastical state existed, that is—in order to assign to it a precise period—from 1201, when the emperor Otho IV. conceded by oath and charter to Innocent III. full jurisdiction over large Italian territories, down to 1870, when the papal dominions were merged in the kingdom of Italy,\* the popes were within their principality both temporal and spiritual princes; and they had already claimed, and in part exercised, feudal suzerainty elsewhere. The jurisdiction over a territory, where they could be comparatively undisturbed by the emperors, was necessary—at least, was thought to be necessary,—for independence and for ecclesiastical sway everywhere alike; but this gain of secular principality was one of the leading causes which corrupted the Roman see. No succession of kings in any European Christian country has surpassed in worthlessness the popes from Innocent VIII. to Leo X., inclusive (1484–1521). As for the rest, the sovereignty over the patrimony of St. Peter and over other lands, acquired afterwards, only removed obstacles; it did not otherwise affect the theory of church power or the practice under it.

2. The theory of church power, which the papal church has always distinctly maintained, since it emerged from the confusion of the middle ages, and even since the appearance of the pseudo-Isidorian decretals, con-

Church in the States  
of the Church.

Papal theory of re-  
lations of church and  
state.

\* Comp. Sugenheim's prize essay, *die Entsteh. u. Ausbildung des Kirchenstaat*, 1854. Sugenheim calls the transaction of Otho at Neuss, near Cologne, June 8, 1203, the magna charta of the ecclesiastical state, p. 134.

templates no absolute theocracy, nor absorption of the state in the church. It was admitted that the powers that be were ordained of God, and that the subject could not be released from his obedience, unless the prince committed acts of gross immorality, or such as had a tendency to injure the church of God. The unity of the church demanded a primate, and the primate alone, in the last instance, could judge what was orthodox truth and what was immoral or of injury to Christianity. He gained the right of a negative in elections of metropolitan bishops, and this right by degrees was extended to other church offices. He had a control in regard to questions affecting certain family rights, and a dispensation from the rigid rules of marriage between relatives. There grew up a body of canonical law, which was acknowledged through Europe, and the supreme right of discipline expressed itself in laws and interdicts, and even in absolving subjects from obedience to a prince who would not submit to ecclesiastical decrees. Questions relating to religious property were brought under his jurisdiction; the universities were in a degree licensed and watched over by him. Several of the princes in different parts of Europe entered into feudal relations to him; thus, John of England did homage to Innocent III., who, as such becoming the suzerain of England, excommunicated the barons and declared the magna carta void.

With all this power, which entered into every department of life, the papal theory admitted a certain independence of the state within its sphere. Gregory VII. taught that the church is of God, while the state, *i.e.*, royal and imperial power, is needed to repress human wickedness. "Who can doubt that the priests of Christ are to be regarded as fathers and teachers (*patres et magistros*) of kings and princes, and of all believers." Innocent III. wrote to the emperor at Constantinople that of the two great lights in the heavens the sun ruled the day and the moon the night. So, in the firmament of the universal church, God made two great dignities, the pontifical and the regal power. "But that which presides over the day, that is, over things spiritual, is the greater; that

over the night, that is, over carnal things, is the less," the difference between the two powers being as considerable as that between sun and moon. Still further he says that "the Lord left to Peter not only the whole church, but the whole world (*totum seculum*), to be governed." Therefore, not only does the highest and last decision in all affairs pertain to him, but it is his also to decide who shall have administration in general. No acts relating to the church, although for its advantage, are valid, he further says, unless sanctioned by the church. Boniface VIII., in the bull "*unam sanctam*," goes even farther. Referring to the two swords (Luke, xxii., 38), which had been long used as symbols of the two powers, and of which St. Bernard speaks as placed, the one in the pope's, the other in the emperor's hands, he says that the emperor's sword is to be drawn only (*ad nutum et patientiam sacerdotis*), according to the will and permission of the priest. The admission of this dependence of the state on the church is necessary for salvation.\*

Thus the theory was strained to its utmost at the very time of incipient nationalization, when such extravagance could not but arouse the opposition of nations and kings. It has never changed since, at least substantially; but policy has generally prevented its being put forth. The theory grew, and if Boniface could have succeeded, it might have grown into one of absolute supremacy. Practically it places the two powers in the world side by side, but to one of them is given that moral and spiritual control which allows of interference in civil affairs on such numerous and various occasions that the other has no real independence.

Protestants claim for the individual the right and duty to decide for himself on questions of duty against state and church both. The Roman church decides for itself against the state on questions affecting the interests of the church or of public morals, and of visiting the state or its head with de-

\* Comp. Jacobson, Art. Staat u. Kirche, in Herzog's Encycl., vol. xxi., 98-139, and Friedberg, de finium inter ecclesiam et civitatem regundorum iudicio, etc. (1861.) Lib. I., chap. i., esp. § 4.

privation of church privileges. And it also claims against the individual the right of deciding over him, on questions of conscience, and of visiting him with censure. Protestant communions, whose discipline is strict, really take the same ground. A man may be shut out from church privileges by a small sect for "using a little wine," when he himself feels no scruples about so doing. It might be thought from this that all religious power stands and must stand in the same relations both towards state and individual. But while this is in one sense true, because all religious associations must establish certain rules of communion; the vast and wide power of the Roman church residing in a single man, who cannot err if he speaks *ex cathedra*, places it on different grounds from the protestant sects which are independent of the state, and much more on different ground from protestant established churches which are dependent.

Against this theory and the practice under it a large part of Christendom revolted at the reformation, and since that event the papal theory has been for the most part practically suspended in the Catholic nations. A flagrant instance in which the old claims of the church were waived, and at which Innocent III. would have been horror-struck, was the concordat between Leo X. and Francis I. (1515), by which the king acquired the right of nominating bishops, and the old pragmatic sanctions, long grievous to the powers at Rome, were abandoned. The precedent of this departure from the strict principles of the Catholic church has since been followed elsewhere.

3. We pass on next to that relation of the church to the state in which it has little or no independent power and is subject to state policy. The earliest example of such subjection is found in the Byzantine empire, and it goes sometimes under the name of Byzantinism. Here mere despotism of the emperor ruled in both spheres, in the political sphere disturbed or overthrown sometimes by successful insurrections, and resisted in the religious sphere by fanatical monks or others more orthodox than the emper-

Church subject to state.



ror. The management of religious affairs in Russia pursues much the same direction.

When the protestant nations shook off the yoke of the Roman church, the reforms were brought first or last under the control of the prince and state. The symbols of belief were determined by synods, perhaps, but accepted by the governing power. The religious property came under the control of the state, and that which had belonged to monastic establishments, being incompatible in its existing uses with the reforms, was escheated or otherwise disposed of. New sects that separated from the reformation were not endured. The *jus reformandi* was held to reside in the state or in its head as representing it. For the most part, the methods of supporting parish ministers then in use were continued, and the people had but little voice in the selection of their ministers. The dependence of church upon state was substantially the same in protestant Germany, Switzerland, England, Holland, and the Scandinavian nations.

In England, especially, the established church is the creature of the state, and the same power that created can destroy it as is shown by the recent disestablishment of the English church in Ireland. This power, exercised by the king, or by the king in parliament, extends to all doctrine, discipline, worship, the tenure of ecclesiastical offices, to the toleration of other confessions or forms of church order outside of the establishment, to church property, to the performance of ordinary religious acts. Under the regime of the old church, convocations met, passed canons, and granted taxes. Afterwards they met for form's sake and adjourned. The bishops were elected by the deans and chapters, subject to more or less control of the pope. Now no choice is made but on nomination of the king. There was no right of worship granted to heretics; Lollards were persecuted to the death. The same right of suppressing heresies passed over to the state and to those who acted under it. Puritans were persecuted, together with Catholics, then Socinians, and Quakers. The act of supremacy under Elizabeth shut out all Catholics

from civil as well as ecclesiastical offices by requiring an oath that the queen was "the only supreme governor of the realm and all other her highness's dominions and countries, as well in all spiritual and ecclesiastical things or causes, as in temporal, and that no foreign prince, person, prelate, etc., hath or ought to have any jurisdiction . . . ecclesiastical or spiritual, within this realm." The act of uniformity prohibited, under penalty of a fine for the first offence, of imprisonment for a year for the second, and of imprisonment during life for the third, the use by any minister of any but the established liturgy, and laid a fine of a shilling on all who should absent themselves from church on Sundays and holidays.\* The Star Chamber, an illegal and arbitrary court, as Hallam calls it, judged in religious cases without being bound by statute law, until it fell in 1641. The corporation act of 1661 enjoined that all magistrates and other officers in the corporate towns who should thereafter be elected, should be incapable of entering on their duties unless they had received the sacrament within a year before their election, according to the rites of the English church. The test act of 1673 required the reception of the sacrament according to the same rites, and the rejection of transubstantiation, before any temporal office of trust could be enjoyed. The acts against conventicles in 1664 and 1665 were particularly severe on dissenters. The first forbade presence at any religious meeting where at least five persons besides the members of the family should be assembled, on penalty, to all persons above the age of sixteen, of three months' imprisonment for the first offence, of six for the second, and of seven years' transportation for the third, after conviction before a single justice of the peace. The other required persons in holy orders who had not subscribed the act of uniformity (*i.e.*, those who gave up their places in the church after the passage of that act in 1660), to swear that taking up arms against the king on any pretence whatever was unlawful, and shut out any one who should refuse such an oath from

\* Hallam, *Const. Hist.*, i., chap. 3, p. 153. Compare the same work for other acts referred to, ii., ch. 11, pp. 472-476.

teaching in schools or coming within five miles of any city, corporate town, or parliamentary borough.

We make no comment on these acts, only that they were in part a revenge for the overthrow of the Episcopal church by the Presbyterians of the long parliament, who, with most other Puritans, had the current view of the right and even duty of the state to set up and defend religion, and were deterred by no scruple from passing laws against heresy and dissent. By the toleration act of 1 William and Mary, and by subsequent legislation, most of which belongs to the last fifty years, all this is done away; almost entire religious liberty is now granted to all forms of religious profession, Catholic and Protestant, and parliament is open to Jews.

The English colonies in America which were first planted, both episcopal, as Virginia, and puritan (independent or congregationalist), as Massachusetts, Plymouth, and Connecticut, carried the views of the mother country, and of the Jewish scriptures regarding church and state, into their institutions. In all or nearly all of them laws were passed providing for the support of the clergy, for the observance of Sunday, and against Quakers and other heretics. The pilgrim colonies, according to their view of church order, prevented the legislatures or general courts from having any direct control over the properly ecclesiastical concerns of individual churches. But in Connecticut a synod set up in 1708 a form of church order, which was legally enacted by the assembly, as the established church order in the colony. There were then no avowed dissenters. When some years afterwards the dissenters appeared and founded churches, the law allowed them, instead of paying to the parish churches the quota for supporting religion, to have it made over to their own ministers. This in substance was the condition of things until 1817, when this connection of religion and the state was dissolved. The progress towards complete separation of the two powers in Massachusetts was somewhat similar. The Baptists in Rhode Island, where they were the controlling denomination, repudiated the theory of the political establishment of religion.

In the protestant states of Germany the attitude of the civil power towards religion was much the same as in England. The maxim was *cujus regio ejus religio*. In fact, all the states, Catholic and Protestant, might unite in this rule, as the former would do nothing contrary to the fundamental principles of their church. The lord of the land, by the peace of Augsburg (1555), was obliged to grant to subjects professing a religion different from his own the liberty of emigrating without loss of goods. The peace of Westphalia (1648) granted the special right to certain protestant nobles and the town of Breslau, of enjoying protestant worship under Austrian sway; but in general it only renewed the *jus reformandi* of the older treaty. Those subjects of a religion unlike that of their prince, who had no public or domestic right of worship in 1624, or who should change their religion after the peace, had liberty of conscience and the civil advantages of other citizens; but their rights of worship were very limited, and they might be compelled to emigrate by their sovereign. The last instance of this kind, we believe, occurred in 1731, when thirty thousand members of protestant communities were driven out of Salzburg by the prince-bishop of that territory, on the ground that they could not show that their religious rights extended back beyond the year 1624, the normal year fixed by the peace of Westphalia.

The Scottish kirk has had a theory of its relations towards the state separating it in a degree from other Protestant churches and approaching to that of the Catholic church. The great points of the theory are that the church is constituted by Christ; that it is a denial of his headship to maintain that the church can be instituted by the civil power; that it is therefore an assumption of the rights of Christ when a government undertakes to regulate the internal affairs of a church, and thus an assumption and wrong done to the church when a lay patron exercises the right of nominating and appointing a minister in a parish—a right which takes away from the church members and the church authorities their just power. These principles, and

Theory of church  
and state in the  
Scottish kirk.



especially hostility to patronage, to which, however, the established kirk has submitted, have been continually cropping out and producing secessions from the established church, until the Free Church of Scotland arose in 1843. If the state had granted to the kirk complete autonomy, and protected it in all its interests, making it the exclusive church of the country, putting down all dissent and abolishing lay patronage, this and this only would have satisfied the claims of the stricter Presbyterians. The theory is based on the *jus divinum* of Presbyterianism, and on the true principle that Christ is the head of his church, and it derived practical strength as well from the attempts of the Stuarts to force a church order on the land which was disliked, as from the abuses of the system of patronage which have been continued since the removal of other grievances. Had there been an entire separation of church and state, the kirk might have avoided numberless evils, and there need not have been such repeated secessions from its pale.

4. We have now reached the last form of relation between church and state, that of complete separation, so far as separation can be complete where a certain degree of protection is required, the same in kind and degree that would be necessary for maintaining rights in any secular sphere of action. This is the plan that now runs through all the states of this union. No other, in fact, is possible as long as all confessions are equal before the law, as long as freedom to found churches is open to all, and as long as the conception exists that a church is a spiritual body, acting on the state only by the moral and religious forces of individual persons. The churches, therefore, and individual congregations are self-subsistent; they provide for their own support; they are entirely free to spread their views, as far as the state is concerned. The states have to some extent limited, by nineteenth century statutes of mortmain, the amount of property which separate congregations may hold, or may hold without paying taxes; and there is a demand on the part of many that church property, as it regards its taxable

Theory of entire  
separation of state  
and church.

quality, shall be put entirely on a level with that of individuals. There are many cases in which churches need the protection of the state, and where they come as plaintiffs or as defendants before the courts. Of this kind are contracts with ministers for their support, the exercise of clerical power, and the question whether certain proceedings are or are not in accordance with the constitution of a local church or of a denomination. All church property, even the effects of church censures, may be brought before civil tribunals. This is the only plan possible, when the equality of all bodies of worshippers and the perfect freedom of worship are taken into consideration, and thus far it has worked well.

There is a plan of adjusting the relations between church and state, in some points resembling this, which has been adopted in another country in quite modern times. Thus, in the charter of Louis XVIII. (1815), it is said that every one "shall receive for his religious worship the same protection. However, the Catholic Apostolic and Roman religion is the religion of the state. The ministers of the Catholic Apostolic and Roman religion, and those of other Christian confessions alone receive stipends from the public treasury." In the charter of Louis Philippe (1830), this is repeated, except the declaration that the religion of the state is Catholic. In the constitution of the republic (1848), the words are "the ministers of the religions at present recognized by law, as well as those which may hereafter be recognized, have the right to receive an allowance from the state."

This plan, especially in its last form, makes a difference between the *licitæ* and *illicitæ religiones*, like the legislation of Rome; and also implies a certain sort of dependence on the state—equal, but equally questionable—for all religious sects. There has been also a tyrannical law, dictated by fear, which prescribes that no association of more than twenty persons, with the object of assembling for religious, political, literary, or other purposes, can be formed without the consent of the government, and under conditions which the public authority shall see fit to impose on the society.

(Code pénal, Art. 291.) This law has heretofore placed tyrannical powers of repression and restriction in the hands of the provincial prefects, but since 1859 the council of state gives the necessary permission in such cases. This certainly is not religious freedom, as understood among us.

It has been seen in the course of this sketch that the practice has been almost universal until modern times of establishing state churches ; that lawgivers in ancient times acted on the principle that the state must maintain existing religions and exclude others ; that among the Jews and under the Christian emperors of Rome one exclusive religion only was tolerated ; that Protestantism began on this plan and had to persecute in order to carry it out ; that, finally, only a few nations in quite recent times have made the church entirely free and separate from the state. Men have pleaded longer for toleration than for separation ; the Baptists of Rhode Island being the first to make the latter a distinct point in their state polity. In this close connection of the state and church some of the wisest and best of men have concurred ; they have gone, in fact, on the assumption that no other plan was possible. On what grounds did they come to this conclusion ? What were their theories of the right of so doing and their views of the good to result ? Let us turn to the opinions of a few of them, and then try to discover whether established religions, and the close connection of church and state, have brought in their train those benefits either to religious or to political society which were expected by philosophers or by Christians.

### § 256.

Of the opinions which prevailed among the wisest of the  
Opinions on the relations of religion to the state. Greeks, Plato in his *Laws* will be admitted to have been the best exponent. The work opens with the question put by the Athenian speaker in the dialogue to the Cretan, who is about to found a new colony, whether the Cretan laws are to be ascribed to a God or to some man.

“ To a God, as we can with all justice say, Zeus among us  
 Plato's.                      and Apollo among the Lacedæmonians,” is the  
 answer. The scene is laid in the temple and  
 cave of Zeus, and the laws of the new colony are to be sanc-  
 tioned by the Delphic oracle. Thus everything is to com-  
 mence with divine help and direction. Religious institutions,  
 however, are not treated of until the eighth book, where, at  
 the beginning, we learn that every day must have its appro-  
 priate sacrifice on behalf of the city, of the people, and their  
 goods. The laws, being brief, need go no farther than to  
 prescribe the festivals dedicated to the principal gods ; the  
 details may be entrusted to the interpreters of religious rites,  
 the priests, priestesses, and prophets. All this is to be done  
 with the help of oracles from Delphi. After speaking of a  
 law against sacrilege in the ninth book, Plato goes on, in the  
 very important tenth book, to consider offences committed  
 more especially against the gods themselves. No man ever  
 committed such offences who did not either deny that the  
 gods exist, or deny their providence, or conceive that by  
 means of propitiations their anger against wrong can be ap-  
 peased. Corresponding with these three kinds of unbelief  
 are three sorts of impiety, which may be divided, each of  
 them, into two, in proportion to their heinousness. First,  
 there is the impiety of denying that divine beings exist.  
 This crime may belong to men of an honest nature who  
 choose the society of the good ; or to crafty hypocritical men  
 without principle, among whom are found diviners and im-  
 postors, tyrants, public orators, generals, initiators into pri-  
 vate mysteries, and sophists. Plato would have no punish-  
 ment meted out to the first of these classes, except admonition  
 and imprisonment. “ The others commit a sin that deserves  
 not one, nor two, but many deaths.” (908 E.) Next follow  
 those who deny a providence, part of whom—those who have  
 become such by want of understanding without bad feelings  
 or character—ought to be put into the house of reformation  
 for not less than five years, away from all communication  
 with other men except the members of the nocturnal council,



so called, who are to have converse with them for their admonition and their soul's safety. (908 E.—909 A. Comp. xii., 968 A.) At the end of this five years' imprisonment, if they should be found again to fall into the same insanity, they are to suffer death. Of the worse portion of those who deny a providence, and of those still more depraved persons who think that the gods can be induced by offerings or purgations to pass by their sins, he omits to speak. But there are some, he says, belonging to the latter class, who practise magic arts, evoke the dead, get an influence by their arts over the living, and for money undertake to destroy private persons, whole houses, and states;—these are to be put into the dreariest of the prisons for life, and when they die to be cast unburied beyond the borders. (909 C.)

The tenth book of the laws closes with a prohibition of private sacred rites and sacred shrines, founded on the consideration that they are the result of vows made in danger or illness, or are intended to appease the anger of the gods against crimes. A penalty for having such *sacra privata* is to be inflicted until compliance with the law is effected.

Plato wished to have all proper instruction given to the young, but never reached the conception of a church or the stated public inculcation of morals and religion. His motives in his religious laws were not merely drawn from the benefit of the state, as if the protection of the gods could be secured by prayers and festivals, but from the improvement of the character of the community. He believed that faith in superior beings who abhorred wrong was necessary not only for the state's welfare but for the individual's perfection; and that religion was more than a support of morals—it was to be supported for its own sake. No one could be good without it. As for the rest, his plan of correcting unbelievers by admonition and imprisonment is a pagan inquisition, only somewhat milder than that of the Dominicans.

Cicero in the second of his books *de legibus* (§§ 6–27), treats  
Cicero's. of laws concerning religion after the manner of Plato, first in a short proem showing the importance to

the state of a belief in divine powers, then giving the heads of a code applying to all things sacred, then commenting on some of them more at large. The utility of a faith in the gods, he thinks, no one can deny who perceives how frequently oaths are used in confirming testimony, and how salutary are the religious sanctions of treaties. In his summary of laws he follows Roman usage and expresses Roman ideas. The main points are that the received religion, its ceremonies and functionaries, are to be maintained in honor, and that the priests or augurs are to have an inspection of all that which belongs to their department. Only once or twice are penalties mentioned. Of perjury he says, that its punishment from the gods is to be *exitium*, from men *dedecus*. Sacrilege is to be treated as parricide. Incest is to be forbidden by the priests, with the enforcement of the highest penalties. The decisions of the augur, in regard to things unlucky, portentous, and calling for divine wrath, are to be respected, *quique non paruerit capital esto*. There are to be two classes of public priests, one to preside over ceremonies and sacred rites, another to interpret the utterances of soothsayers who had been declared by the senate and people to have authority. There are to be no nocturnal sacred rites of women, except those which are duly made for the people; nor are there to be secret rites and initiations, except in the worship of Ceres. No contributions in honor of any god are to be collected, except those taken up by the priests of the Idæan mother.\* A limit is to be prescribed to the quantity of the precious metals and ivory consecrated to religious purposes. Expense and mourning for the dead are to be kept within bounds. These will give an example of Cicero's religious laws, which show that he would have the system under state control. It does not occur to him to punish opinions, as it did to Plato. As for the rest, there are no profound thoughts in this exposition of his views given by the great orator.

\* This the law allowed.

## § 257.

The power of the state to legislate in this sphere was un-  
Opinions after the questioned, and its use, as we have seen, con-  
rise of Christianity. stant. On one occasion, however, after Chris-  
tianity had acquired a strong foothold in Africa, a heretical  
sect almost struck out a new theory of the relations between  
church and state. The Donatists in Africa, having separated  
from and denounced the orthodox church, on the ground that  
it allowed persons, who had given up the sacred books in  
Diocletian's persecution, to administer baptism and other rites,  
and had thus acknowledged that the outward form in their  
hands was valid; a great controversy was kindled, and, at  
length, the civil power intervened. From mildness the offi-  
cers of the state passed over to persecution of the Donatists,  
first under Constans (A.D. 347), afterwards under Honorius  
(414), when Augustin approved of the resort to violence.\*  
The Donatists, under their sense of injury, appear to have  
discovered and proclaimed the wrong of using force in mat-  
ters pertaining to opinion, and to have approached the prin-  
ciple of a separation between church and state. Neander (ii.,  
212, Torrey's Transl.) remarks that "the point of view first  
set forth in a clear light by Christianity, when it made religion  
the common good of all mankind and raised it up above all  
political restrictions, was by the Donatists manfully asserted,  
in opposition to a theory of ecclesiastical rights at variance  
with the spirit of the gospel, and which had sprung up out of  
a new mixture of ecclesiastical with political interests. They  
could not succeed so well in unfolding the relations of the  
church to the state [as in opposing force in religion], for here  
they easily passed over from one extreme to the other. If

\* In a lost work, *contra part. Donati*, lib. ii., he had said that  
"he did not approve of heretics being forced into communion by the  
secular power." Now (*retract*, ii., 5), he gives as a reason for his  
change of opinion, that then he had not learned by experience how  
much evil they would dare to do, owing to their impunity; nor how  
much they would be benefited by "diligent discipline."

their opponents erred on the side of confounding too much the church with the state, they, on the other hand, were too much inclined to represent the opposition between the two, which was grounded in the early relation of the church to a Pagan state, as a relation that must ever continue to exist." This theory of the relation of religion to the state is involved in a reply of Donatus, Bishop of Carthage, to an imperial officer, "*quid est imperatori cum ecclesia*," which is of a piece with the spiritualism of their theology. But neither their political nor religious opinions bore fruit, for they were outweighed by the obloquy which attached to them as schismatics and by the weight of ability on the church side ; and it was their destiny to die out in the overturning of Africa by the Vandals and Moors.

The Catholic church kept its ground against the civil power in part by the theory of perfect independence with the right of being protected. The Protestants fell back again to the theory which prevailed in the Roman empire of the west, and which made the church a tool of the state—the head of the state of course being Christian and Protestant. But the rights of an open Bible for all, and of religious liberty which Protestantism really demanded and made necessary, raised up schismatics ; yet the new churches already established, following the old precedent, would admit of no other church by their side on an equal footing ; hence came persecution by the civil power, and a revelation by experience to the persecuted party of the value of religious liberty. But the first disputes were : what is the form of the church order taught in the New Testament, and what right has the state to force compliance with rites and ceremonies which are not for edification. The relations of state and church would thus come up for consideration, and one of the most thorough discussions was that which appears in Hooker's ecclesiastical polity.



## § 258.

The first four books of Hooker's ecclesiastical polity appeared in 1594, the fifth in 1597, the sixth and eighth in 1648 (long after his death, which occurred in 1600), and the seventh with those before published in 1662. There is no sufficient reason to doubt that these last books are substantially as he left them. His plan, which he gives in his preface, aims to refute the position of Puritan Calvinists, who held that a government by presbytery and synod was alone divinely prescribed for the Christian church. He denies that any one form of discipline is laid down in the Scriptures, contends for episcopacy as of apostolic origin, and for the power of the church to make rules not contained in the Scriptures which are binding on its members, and then discusses the power which the prince ought to have over the whole body politic in things ecclesiastical. In the first book he declares "what law is, what different kinds of law there are, and what force they are of according unto each kind." In the second he attacks the puritan position "that Scripture ought to be the only rule of all our actions, and consequently that the church orders which we observe, being not commanded in Scripture, are offensive and displeasing unto God." The third, continuing the same argument, seeks to show that it is not true that the government of the church is beyond human power to modify, nor that "in Scripture there must of necessity be found some particular form of polity ecclesiastical, the laws whereof admit not any kind of alteration." The *fourth* refutes the accusation that in the established church "the right form of church polity has been corrupted with manifold popish rites which certain reformed churches have banished from among them;" and the inquiry is made "whether there be just exceptions against the customs of our church, when [men] plead that they are the same as the church of Rome hath, or that they are not the same which other reforming churches have devised." In the three next books special charges are examined against the worship, the

Hooker on church  
and state.

introduction into orders, the power of jurisdiction, especially the standing and authority of bishops in the church of England. "And because," Hooker adds, "besides the power of order which all consecrated persons have, and the power of jurisdiction which neither they all nor they only have, there is a third power, a power of ecclesiastical dominion, communicable, as we think, unto persons not ecclesiastical, and most fit to be restrained unto [*i.e.*, to belong exclusively to] the prince or sovereign commander over the whole body politic; the eighth book is reserved unto this question, and we have sifted therein your objections against those pre-eminences royal which thereunto appertain." (Pref. ch. vii., 172, 173, ed. Keble, vol. 1.)

In the early books Hooker in some passages elevates "ecclesiastical authority even in matters of belief,"—I cite Hallam's words (Const. Hist., i. 296),—"with an exaggeration not easily reconciled to the Protestant right of private judgment, not indeed on the principles of the church of Rome, but on such as must end in the same conclusion, and even of dangerous consequence in those times." This charge seems to go too far. Hooker says (iv., 13, p. 476), that in things indifferent, what the whole church doth think convenient for the whole, the same, if any part do wilfully violate it, may be reformed and inrailed again by that general authority whereunto each particular is subject." And again (p. 477), "the way to establish the same things indifferent throughout them [*i.e.*, through all churches], must needs be the judgment of some judicial authority drawn into one only sentence, which may be a rule for each particular to follow. And because such authority over all churches is too much to be granted unto any one mortal man, there yet remains that which hath been always followed as the best, the safest, the most sincere and reasonable way, namely, the verdict of the whole church, orderly taken and set down in the assembly of some general council." And yet he says (ch. 14, p. 484), "true it is that neither councils nor customs, be they never so ancient and so general, can let the church from taking away that thing which

is hurtful to be retained." That is, what was good in one age may become hurtful in another and be abrogated, although enacted by an ecumenical council and binding in its day. In these teachings there is little to find fault with.

But our concern is chiefly with the eighth book, where the relations of church and state are discussed. Here Hooker's principal points are (1) that church and commonwealth are the same community, and that the prince or supreme power in the one stands in a like relation to the other. (2) The right to such power is by contract, the people being the ultimate source of power. (Comp. § 61 *supr.*) He regards it a presumption in favor of such a theory that the civil chief among the Jews had ecclesiastical power, as is seen in the instances of David, Asa, Simon Maccabæus (1 Macc., xvi. 41-44), while the priests had no power to change the religion. It is true, as he says, that the changes in public worship among the Jews came constitutionally from the kings, or needed their sanction; but it is true also that they had no power given them to deviate from the forms or the spirit of the law of Moses. And so Uzziah, the most powerful, perhaps, of the later kings (2 Chron., xxvi., 21) when he began to burn incense, a prerogative of the priests by the Mosaic law—was resisted by the high-priest and eighty of his brethren. "Our state," Hooker says, "is according to the pattern of God's elect people." But this does not make it imperative upon a Christian people to adopt the Jewish system, for we are authorized by the words of Christ, where he taxes the Mosaic law with imperfection (Matth., xix., 8), as deviating from the original idea of marriage, to lay it down that neither civilly nor ecclesiastically the Jewish system was perfect. It was good for its time, for its part in the progress of mankind, for the people it had to deal with, but not absolutely good, and therefore no universal pattern. There are no institutions that are good absolutely or perfect; they are only good relatively, and as such, when circumstances change, may be changed for something better.

Against the puritans of the English church in his day,

Hooker had to maintain his position that a church and commonwealth may form the same community. They held, as he states, their position, that church and commonwealth "are distinguished not only in nature and definition, but [are] in subsistence perpetually severed; so that they which are of the one can neither appoint nor execute in whole nor in part the work belonging to them which are of the other, without open breach of the law of God, which hath divided them and doth require that, being so divided, they should distinctly or severally do their works. With us [that is, with Hooker and the non-puritans of the Church of England] the name of a church importeth only a society of men first united into some public form of regiment, and secondly, distinguished from other society by the exercise of religion." With them the name of a church not only denoteth a multitude of men so united, but also the same divided necessarily and perpetually from the body of a commonwealth, so that, even in such a political society as consisteth of none but Christians, the church and commonwealth are two corporations, each independently subsisting by itself. "We hold that, seeing there is not any man of the Church of England but the same is also a member of the commonwealth, nor any member of the commonwealth which is not also of the Church of England—therefore, one and the same multitude may be in both. Nay, it is with us true that no person appertaining to the one can be denied also to be of the other."

But objections to this view of his would arise on the ground that the Christian church among the heathen has a separate communion, and that things pertaining to religion are distinguished from others, and are under spiritual persons. He admits an absolute separation between the church among the heathen, and the heathen state, although all Christians belonged to the state. There are, then, not only conceivable, but also historically real conditions in which state and church are separated. But he adds that when Rome became Christian this separation could not continue without supposing that the clergy are the church in a commonwealth, to the exclu-



sion of prince and people. "For if all that believe be contained in the name of the church, how should the church be divided from the commonwealth, when all believe?" They are then, personally one society, called a commonwealth for one reason, a church for others, and for this society there must be different officers. Difference of officers, secular and ecclesiastical, is no argument that church and commonwealth are always separate and independent."

Thus, in a commonwealth of infidels the Christian church and commonwealth are independent; in the states under papal jurisdiction, "there is one society in church and state, but the bishop of Rome doth divide the body into two, and suffers not the church to depend on any civil prince; while in the realm of England"—he might have added in parts of Germany and Switzerland, and in the Scandinavian countries—"one society is both church and commonwealth, which it was not among the heathen, and, unlike the Catholic states, dependent on the chief in the commonwealth."

There seem to be several weak points in this exposition. The first is that if there be in a country a minority of heathen, they are of the state but not of the church, and must continue so unless it be right to drive them out or force them to become nominally Christians. Another is that, if the two, church and state, are composed of exactly the same persons, it does not of course follow, that church and state are one. Nor can any argument be drawn from the evil of the coexistence of two powers, both of which have claims upon the conscience, for seeming collisions of obligations are always taking place. Even in a state religion, the limitations on the power of the prince (or supreme authority) may be such as to give a practical independence to the church in doctrine, worship, discipline, including induction into office and authority, as well in exclusively ecclesiastical matters as in official relations to a parish or see. On the other hand, if the prince may be at heart an enemy of the church, or an unbeliever indifferent to its interests, a theory that would give him any important control over the church cannot be truly a Christian one. The

church ought to be controlled by those who have a Christian faith.

But to return to Hooker's doctrine. Church and state being one, and the ruler being head over both, whence does he derive his power? Hooker, before Grotius, conceives of a contract in which, according to certain conditions, he is appointed to his office for himself and his line by the people (comp. § 61 u. s.). According to this view, church and state, or the nation acting in both capacities, ought to consent to the introduction of a new line of rulers, when the existing one runs out, or when the actual prince has violated the original contract. For surely so important a transaction as putting on him a double crown, ought not to be regarded as simply political, but requires the consent of the church—acting, now that there is no prince, by its organic powers. And of the violation of contract the country must judge.

The true view, however, would seem to be that, in the nature of a spiritual religion like Christianity, which has external relations also, there is a department where it is independent, and another where it must either be controlled by state law or control the state. Practically, if all the people belong to one church, there must be such a division between the work of the political and that of the ecclesiastical functionary, that they shall not invade each other's province. Much more, when free thought, united with narrowness of mind, a speculative spirit, and a scrupulous conscience, produces diversity of sects, there needs to be a separation more complete between the two powers; lest by attempts at uniformity the state, aided by a part of the people, produces such bitterness between different theologies or ecclesiastical forms, as shall seriously endanger the peace, if not the stability of a country. Hooker's theory, almost of course, leads to persecution.

Hooker's views of the power of a church in things indifferent, contrast favorably with the narrow adherence of the puritans to the letter of Scripture; and this, with his great breadth of thought in general, and his advocacy of an ecclesiastical doctrine which lay at the basis of the English establishment

without being ritualistic or mediæval, has put him deservedly in the front rank of writers on ecclesiastical polity in that country. The political side of his theory tended to form that of Locke. (Comp. Hallam, Const. Hist., i., 297.)

Among more recent writers on the relations between church and state, Bishop Warburton only, with two distinguished men of our own day, Dr. Thomas Arnold and Mr. Gladstone, can be spoken of here, and of their opinions but a short account can fall within our limits.

### § 259.

Warburton's treatise "on the alliance between church and state, or the necessity and equity of an established religion and a test-law demonstrated," in three books, first published in 1736, deserts the grounds on which Hooker stood in several very important respects. He says (ii., 5, p. 221),\* that "the Puritans and their incomparable adversary . . . divided truth and falsehood pretty equally between them. The Puritans were right in supposing church and state to be two independent societies; they were wrong in supposing the two societies must always continue so; but right again in holding that while they did so continue, the civil magistrate had nothing to do with religion. On the other hand, Hooker was wrong in thinking *church and state* was only one society under two different names. He was right in asserting the civil magistrate's supremacy in religion, but wrong again in supposing that this supremacy was by nature and not by compact. Thus from right premises the Puritans drew a wrong conclusion; and from wrong premises Hooker drew a right one. But if, from the wrong conclusion of the *former*, the supremacy of the magistrate was forever excluded, yet from the right conclusion of the latter he was admitted before the time. And all this confusion arose from common error, admitted on both sides, that if church and state be distinct and independent societies, they must *ever*

\* I cite vol. vii. of his works, London, 1811.  
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remain distinct and independent. The result from all we have seen was this, that the *puritan* principle established an *imperium in imperio*, and that Hooker's introduced *persecution for opinions*."

Warburton then conceived of a relation between two independent powers, a state and a church. How such independence came to begin he nowhere tells us, if I am not deceived ; and as Christianity was not coeval with the societies where it flourished, it could only have come into a given state by sufferance or by some superior power. But, not to dwell on this, he conceives of civil society as laboring, when it was alone, under several defects. Its laws could only restrain from open transgression and often were unequal to that result ; it is general in its operations, while the care of religion is for particulars ; it could make laws for perfect, but not for imperfect obligations [*i.e.*, duties] and their infraction ; and it actually increased and inflamed the inordinate appetites of a state of nature for whose correction it was invented and introduced. Society again can punish, but it cannot (in any adequate degree and measure) reward. This only religion can do, and thus is necessary to civil government (B. I. to chap. iv.).

The end of civil society is security to the temporal liberty and property of man. The end of religion is the salvation of the soul by means of doctrine and morals, which, equally with the end, must be outside of the province of the civil magistrate. This maxim, however, that doctrine and moral opinion are not within the magistrate's sphere, must be qualified by excepting from it the being and providence of a God, and the natural essential difference between good and evil. These are excepted, because they are the very foundation and bond of civil policy. He then endeavors to set forth the causes which have concurred in producing mistakes in regard to the magistrate's real office.

The end of religion is to procure the favor of God, and to advance and improve our own intellectual, *i.e.*, our inward, as opposed to our animal nature. It leads to a religious society, which by its nature is *sovereign and without depend-*



*ence on the civil.* This religious society, however, has not in and of itself any coercive power of the civil kind. Coercion is unnecessary and unfit for the attainment of the good which religion proposes. As to the objection that purity of worship, being outward practice, can properly be supported by coercive measures, he admits thus much : that a religious society has and must have in itself the power of expelling refractory members from its body, or, in other words, a right of excommunication (i., ch. 5).

In Book second, Warburton discusses that union between church and state which produces a religion established by law. It is an alliance by free convention and mutual compact between parties, one of which cares only for the body, the other for the soul. Each party had motives of its own in making this alliance. The magistrate or the state had for its motives to preserve the essence and purity of religion, to improve its usefulness and apply its influence in the best manner, and to prevent the mischief which in its natural independent state it might occasion to civil society. The motive of the church could be no other than security from external violence. Two other conceivable motives—to engage the state to propagate the established religion by force, and to obtain from the state, honors, riches, and powers—Warburton dismisses, the one as unjust, the other as impertinent.

From the fundamental articles of the alliance—which are that the church shall apply its utmost influence in the service of the state, and that the state shall support and protect the church—are to be deduced the terms and mutual grants of the alliance. From the obligation of the church proceeds a settled maintenance for the ministers of religion, and an ecclesiastical jurisdiction with coactive power, which introduce the dependency of the clergy on the state. From the state's obligation to protect the church proceeds the ecclesiastical supremacy of the civil magistrate, “ which again introduceth, on the other hand, the right of churchmen to a share in the legislature.” Thus, the church receives from the state a public endowment for its ministers, a seat of the bishops in parlia-

ment, and a jurisdiction by coercive power for reformation of manners. The second point—which touches not the general argument, but the special case of the church of England—is thus defined: that the bishops sit as guardians of the church and barons of the realm; as part of an estate and not a separate estate by themselves, and by a right which would terminate with the termination of the alliance. The third point—the privilege of jurisdiction for reformation of manners—is thus qualified, that no matters of opinion and no civil matters which the temporal courts can inspect properly come under it; that the clergy are themselves under the civil laws; and that the ecclesiastical courts are dependent in the last instance on the civil.

On the other hand, the state by this alliance receives supremacy in matters ecclesiastical. Hence, no ecclesiastic can exercise his functions without approbation of the magistrate, nor any church assembly sit without his permission, nor any member of the church thus established be excommunicated without his consent.

In another chapter he seeks to show that the Christian religion is of all others best fitted for such an alliance with the state as may be most productive of their mutual advantage, and that of all establishments the church of England is the most perfect. This, as not essential to the general argument, we omit, and pass on to the third book, where test-laws are defended. At the beginning of this book he defines a test-law to be “some sufficient proof or evidence, required from those admitted into the administration of public affairs, that they are members of the religion established by law.” Here it occurs to him that there may be at the time of the alliance more than one religion. Which of these shall the state take as its partner? Warburton answers unflinchingly the largest; the largest being more nearly on an equality with the state than the rest, as well as having better ability to answer the ends of the alliance and swaying by its influence the greater number. Yet full toleration is to be given to the minor religions, with the restriction of a test-law to keep them from hurting that

which is established. According to this principle, where there is a union of countries under one sovereign, there may be several established religions, as the Episcopal in England, the Presbyterian in Scotland (and his position would require him to say the Catholic in Ireland). And again, where the church, selected on account of its numbers, loses its superiority, it may be disestablished, "and a new alliance is of course contracted with the now prevailing church, for the reasons which led to the old alliance." Thus the alliance between the Pagan church and the Roman empire, and that between the Popish church and the kingdom of England, were broken because these could no longer observe the terms of the alliance.

But, if the minor religions spring up after the formation of the alliance of a church with a state, and are only tolerated; the feeling that every one of them has, that it is alone true and pure, causes it to aim at the ruin of the rest; while envy at the advantages of an establishment will unite the tolerated churches in one common quarrel to disturb its peace. Thus the establishment, needing protection, calls on the state for help, which gives it a test-law for its security, whereby an entrance into the administration is shut to all but members of the established church. Such a test-law is required by the terms of the alliance, and is fairly a right of the church; the security of the state equally demands it on the principle "that no man ought to be trusted with any share of power under a government, who must, to act consistently with himself, endeavor the destruction of that very government." Thus, if establishment and toleration had been secured with no check, the evils would have been increased. A test-law was necessary to mitigate these evils and guarantee the existing state of things.

The remainder of the book is taken up with refuting objections, of which there are three main ones—that a test-law violates the common rights of subjects, is injurious to true religion, and may endanger religious liberty. It is the less necessary to enter in detail into these, since test-laws have

disappeared from the English constitution; which it was an aim of the work to defend, and since an establishment may be sustained without them—better, as experience seems to have shown, without than with them.

The conception of an established church in this treatise is a very low one, and would commend itself to no earnest mind. Let the state choose the strongest church, whatever it be, hedge it around with law, especially defend it by a test-law; this is all. Could this satisfy the claims of any Christian confession? The church is thus the creature of the state, liable to be cast off if it loses its relative superiority to other tolerated religious bodies, and put into its position because it serves the state's purposes.

The toleration conceived of is a step beyond the old condition of sectaries, thanks to the tolerant but indifferent age of Locke. But the principle of the test-laws must allow not only the exclusion of those who do not belong to the established church from a share in the government, but also the punishment of all who undertake by writing or action to seek to weaken the establishment.

It is not true that a church, as independent as any large community in the state can be, must needs be an *imperium in imperio*. It is protected within its own sphere of action; but if it go beyond the law, some individual transgresses the law on its behalf and is punishable. It can hold property, landed or other, unless the state forbid, and if it is accumulating too much in its hands, the law can prevent this as the laws of mortmain prevented it. Several churches within the state would each prevent the other from becoming an *imperium in imperio*. Warburton, again, seems not to have thought it possible that the alliance which he favors would tend to frustrate the good he has in view. But it certainly *may* be true that spiritual ends contemplated in the existence of a church, and the great help it can afford to the state if it keeps to its purity, may not be as likely to be realized, if by its alliance with the state it is able to put on dignity and worldly magnificence, if its higher clergy are barons and peers in par-



liament; as it would if it were engaged in the simple work to which it is called of being a guide to the souls of men towards a Christian life.

§ 260.

Dr. Arnold's views we gather principally from a fragment on the church, written in 1839-1841, but published after his death, which occurred in 1842. Arnold's opinion on church and state. In the second edition (1845), two appendices are added. This is but a part or a prelude to a longer work which this admirable man had in contemplation. Briefly expressed, they are these: that as the object of Christian society includes both the improvement of the life of its members by the means and motives which the gospel supplies, and also the increase of the society beyond its existing bounds until it become universal; so great an extent of plan requires "that it should be a sovereign society or commonwealth;" for as long as it is subordinate or municipal, it cannot fully carry its purposes into effect. On that supposition two powers, the one possessed of wisdom, the other of external force, act together on the whole of our being and often in opposition to one another. This power and wisdom ought normally to be united: "the Christian church should have no external force to thwart its beneficent purposes;" and "government should not be poisoned by its internal ignorance and wickedness," so as to "advance the cause of God's enemy rather than perform the part of God's vicegerent." This is the perfect notion of a Christian church, that "it should be a sovereign society, operating therefore with full power for raising its condition, first morally, then physically; operating through the fullest development of the varied faculties and qualities of its several members, and keeping up continually as the bonds of its union, the fellowship of all its people with one another through Christ, and their communion with him as their common head" (pp. 4-12).

With this notion of a Christian church are inconsistent first, the system "in which a very few of its members are active,

and the great mass is passive,—or popery in all its shapes Romanist or Protestant ;”—and secondly, “the taking of any part or parts of human life out of its control, by a pretended distinction between spiritual things and secular,”—a heathenish distinction, “which tends to make Christianity, like the religions of the old world, not a sovereign discipline for every part and act of life, but a system of communicating certain abstract truths and for the performance of certain visible rites and ceremonies” (p. 13). Under the first of these two heads the error culminates in the notion of a priestly class or order in Christianity, which Arnold undertakes to refute in the remainder of this unfinished work (pp. 24–132). In the appendix, his views on the relations of church and state, which would have followed apparently under the second head mentioned above, are expressed in several fragments. In his plan of a work on “Christian Politics” belonging to 1832, after speaking of the evils and causes of dissent, and of the pretended remedies for it, of which he names two—disestablishment, and absolute equality of dissenters with churchmen in civil rights, by which latter their separation from the establishment would be confirmed and increased,—he comes to the “true remedy.” This he considers to be “an enlarged constitution of the Christian church of England, which is the state of England.” We may find out his meaning in these words from another fragment written in 1833–34 (pp. 167 et seq.). The “great errors which” “he here purposes” to combat are two; one relating to the state, and the other, to the church. “The first is that the state, as such, is of no religion,” “that its business is simply to look after the bodies of men; to provide for the security of their persons and property; and that, therefore, it may and ought to leave the concerns of religion to individuals, and to make no public provision for its maintenance.” The premise and conclusion here have been generally held together, although Warburton held the premises, and advocated the association by the state with itself of an established religion as an ally. But in reality the state employs its services as it would the services of medi-

cine, agriculture, or political economy, fixing its place and giving it certain privileges by law. Thus the state is "an authority essentially sovereign over human life," and "must naturally have a proportionate responsibility. Standing as it were in the place of God, it should imitate God's government, wherever the imperfections of humanity do not render such imitation impossible. It seems then an uncalled-for assertion to maintain that it should regard the bodies of men only," and the wider doctrine of the old philosophers is surely more in accordance with the state's sovereignty. Here Arnold enters into a refutation of Warburton's opinions in several respects, growing out of his position that the state ought to teach the three fundamental principles of natural religion, the being and providence of God with the natural essential difference between moral good and evil, yet not as "promoting our future happiness but our present," and as being the foundation and bond of civil policy, whereby the doctrine that the sole end of civil society is the conservation of body and goods is not contradicted. The state also must punish evil on other principles, (according to Warburton,) than those of pure morality and religion, and is unable to reward virtue. On these points Arnold observes first, that temporal or present happiness is the same in kind with future, and were this the state's immediate object, conservation of body and goods would be but a small part of it. Again to the position that the state cannot reward virtue he replies that the church is equally unable to do the same; it professes to believe in such rewards, and teaches such a faith through its public teachers, as it does through its members, but it goes no further. To the remaining position that "the state punishes on other principles than those of morality and religion,"—as, for instance, "on account of and in proportion to the malignant influence of wrong-doing on civil society,"—Arnold replies that this imputation peculiarly touches the state and is one to which every society composed of human beings is liable. It might be, and has been maintained that the church—however related to the state—has no punishment of its own; its

censures only suspend or shut out from the privileges of the society for purposes of correction, that "the spirit may be saved," or at most, declare the offender to be of such a character that fellowship with him is impossible. In the appendix to the inaugural lecture delivered by him as professor of modern history (p. 74, Am. Ed.), his opinions on this point, and the nature of the state are given in brief a little before his death. Excommunication he regards as a penalty like the Greek *ἀτίμια*. But surely, if it deprives of no civil rights and derives its lawfulness not from state-law but from the New Testament; it cannot be regarded as a penalty proceeding from the state, and the church does not practice it as such. His great point is that the state has moral ends which we acknowledge. But in carrying out his views, he not only holds that a Christian state "being the perfect church, should do the church's work," but also that a "time might come when a rejection of Christianity would be so clearly a moral offense, that profane writings would be as great a shock to all men's notions of right and wrong as obscene writings are now; and the one might be punished with no greater injury to liberty of conscience than the other." Thus the perfect church will punish for opinions. But the *shock* given by obscene writings is not the primary cause why it should be rationally punished. A rejection of Christianity on the part of the profligate may do good; calm discussion may do good; obscenity is only evil.

It is true, he adds, that governments, owing to the feeble influence of philosophy and religion over human laws, have confined themselves to lower sorts of good to the neglect of higher. Supposing, however, the influential majority in any state to be good and wise men, their political wisdom would employ religion and philosophy to promote the moral and intellectual, no less than other means to promote the physical well-being of their community. In such a case the state's sovereign power, combined with its peculiar wisdom, would choose for itself the true religion, as it would choose also the truest system of political science, and in adopting this religion



would declare a belief in its promises, and an adherence to its precepts—in other words declare itself Christian. By so doing it becomes a part of Christ's Holy Catholic church; not *allied with* it, which implies distinctness from it, *but transformed* into it. But, as for the particular portion of this church which may have existed before within the limits of the state's sovereignty—the actual society of Christian men there subsisting—the state does not ally itself with such a society; for alliance supposes two parties equally sovereign, nor yet does it become the church, as to its outward form and organization; neither does the church on the other hand become so lost in the state, as to become in the offensive sense of the term, secularized. The spirit of the church is transfused into a more perfect body, and its former external organization dies away. The form is that of the state, the spirit is that of the church; what was a kingdom of the world is become a kingdom of Christ, a portion of the church in the high and spiritual sense of the term; but in that sense in which “church” denotes the outward and social organization of Christians in any one particular place, it is no longer a Christian church, but what is far higher and better, a Christian kingdom.”

To the view here set forth several objections can be made, which Dr. Arnold notices in order. The first is “that it interferes with the political rights of men by making them depend on religious opinion; for if the state, as such, be essentially Christian, those who are not Christians cannot be members of it.” [And those who are, it might be added, on emigrating to such a country, ought to become citizens at once.] The validity of this conclusion is admitted, and Arnold does not shrink from avowing that “Christianity forms so broad a line morally between those who embrace it and other men, that a man who is not a Christian is most justly excluded from citizenship in a Christian state, not merely on grounds furnished by revelation, but according to the highest and noblest views of the nature of political society.” While thus he gives a more antique cast to the notion

of citizenship, he would, without doubt, admit that non-citizens ought to have those securities which justice makes right.

Another objection which he notices is that, owing to almost necessary differences of religious opinions, the state will have a vague and very comprehensive creed ; or, if it adopts the creed of a particular sect, dissenters will either be excluded from political rights or will be qualified to legislate for the concerns of an established religion with which they do not hold communion.

In reply he says, " I call a state ' Christian ' when it declares its belief in the divine origin and supreme authority of the Christian revelation as contained in the Scriptures ; I call the united kingdom, as yet, a Christian nation, although it be neither Episcopal nor Presbyterian, but establishes the one form in England and the other in Scotland." And if the parts complain that the state is not fit to legislate for them because its supreme government consists indifferently of both parties, this supposes so strong a sense of differences as to render it proper that they should rather form a confederacy than a state.

But it is said also that " the church is essentially distinct from the state and ought not to be confounded with it. It may be correct to say that they are allied together, but not that the state is actually the church." To this Arnold replies that if the sole object of political society is, as Warburton holds it to be, the conservation of body and goods, the distinction between it and the church is necessary and perpetual. But if the object of the church is the advancement and improvement of our intellectual nature, as Warburton defines it, " then it is as nearly as possible identical with what Aristotle declares to be the object of the state, namely the happiness of society,—happiness, as he expressly insists, consisting both in physical and moral good, but much more in the latter than in the former (Arist., pol., vii. or iv., 1, 2, 3, 4, 12). Every state which is not Christian seeks man's highest happiness with mistaken views, and every church, before the state

becomes Christian, seeks man's highest happiness, since the cessation of miraculous gifts, with deficient power." "It is constantly thwarted by not possessing the power of outward dominion. But the state is capable of receiving the knowledge of the church, whereas it cannot part with its essential attribute, nor is the church fitted to exercise it. Thus the state, having been enlightened by the knowledge of the church, becomes a society seeking the same end which the church sought, and with the same knowledge, but with more extensive means of attaining it, because its inherent sovereignty gives it a greater power over outward things. And this was my meaning," says he, "when I said that in a country where the nation and government are avowedly and essentially Christian, the state or nation was virtually the church."

Until such an ideal state of society becomes a reality, the church must obviously be separate from the state in such a sense that its interests are not the same, and it often has to resist the state's injustice. But even when the state is perfectly Christian, will it follow, because the state is in perfect harmony with the church, that therefore they are identically one? Or will it even follow that the state will then absorb or supersede the church? The notion of such unity seems to be derived from Hooker, but to be put in a peculiarly beautiful light by Arnold, and his bright ideal misleads him.

The true statement is, that as every state has its own local sphere, so it has its sphere of work and action, beyond which, within its territory, it ought not to pass. So the church has its sphere, while Christian society and the motives forming character are universal. The instinctive sense of what is his part will confine the perfect man within his own department, and the same good sense will adjust the limits between state and church action; but a perfect state of society would not remove or obliterate the limits, for they are founded in the nature of man as a creature under law and under religious obligations.

Mr. W. E. Gladstone, in 1838, published his treatise on "the state in its relations with the church," which soon passed through several editions. We use the fourth (2 vols., 1841). It is a thorough practical treatise, and after an introduction giving some of the prevalent theories held in England in regard to these relations, considers the following points: the duty, the inducements, the ability of the state in respect to religion; the function of the state in the choice and in the defence of the national religion; the subsisting connection between the state of the United Kingdom and the church of England and Ireland; the reformation as it was related to the doctrine and practice of private judgment; this doctrine and practice of private judgment, as it is related to the union between church and state. These are followed by details of the existing administrative practice in ecclesiastical affairs, and a chapter on the ulterior tendencies of the movement towards the dissolution of the connection between church and state.

Mr. Gladstone's theory in regard to this connection, in its leading outlines, may be stated as follows. A common life demands a common religion, in order to balance its dangers and tendencies towards positive evil. There are two forms of common life according to nature, the family and the state. The state has a moral office and a conscience or state duty, "and the lawgiver has the same need to be ethically instructed as the individual man" (chap. ii., 69). "Religion is applicable to the state, because it is the office of the state in its personality to evolve the social life of man, which social life is essentially moral in the ends it contemplates, in the subject-matter on which it feeds, and in the restraints and motives it requires; and which can only be effectually moral when it is religious. Or, religion is necessary to the right employment of the state as a state" (chap. ii., 74). And the nation, inasmuch as it "fulfils the great conditions of a person, a real unity of being, of deliberating, of acting, of suffering, and these in a definite manner and upon an extended scale, and with immense moral functions to discharge, and influences to



exercise both upon its members and extrinsically," has therefore such a "clear, large, and conscious responsibility as can alone be met by its specifically professing a religion, and offering, through its organ, the state, that worship which shall publicly sanctify its acts" (*ib.* 87). All this is confirmed, when the state is felt, under the teachings of the scriptures, to be a divine ordinance and eminently such, and when religion appears in the distinct form of the Christian revelation. Moreover, as Christianity is a principle of life, intended to govern and pervade all life, must it not govern and pervade our human common life, our association in the family and in the state? The state and the church have both of them moral agencies. But the state aims at character through conduct; the church at conduct through character; in harmony with which the state forbids more than it enjoins, the church enjoins more than it forbids.\*

"The powers of church and state are coördinate; and each is ordained to ends included within the purview of the other. The state is a moral being and must worship God according to its nature: it is thus intrinsically competent to promote the ends of religion, and extrinsically it has effective means of aiding them; in both respects it is morally bound to render that assistance. As on the other hand the ministry of religion, whether under its general or its Christian idea, is able in many ways to promote the purposes of the state" (*ib.*, 102).

A union by law being assumed between state and church, what shall that church be? Mr. Gladstone says that "on any other than specifically Christian principles, the human

\* But the state's immediate sphere is jural, and obligation consists chiefly in not violating rights. It could not be otherwise, unless the state's sphere were so enlarged as to include all moral, nay, all religious teaching also within its province. On the other hand the religious teacher says: "man, who made me a judge or a ruler over you," and "render unto Cæsar the things that are Cæsar's, and unto God the things that are God's." He supplies motives for all right action, especially for right action in the state, but does not act as an officer of the state.

understanding would probably incline to the theory of a plurality of establishments ; " on *those* it can only support a Christian one. Can it support more than one, for instance, a number of competing forms of the Christian faith, which perhaps do not acknowledge each other to be branches of the true church ? He thinks (*ib.*, iii., 122) that " if there be between any set of distinct religious communions not merely a nominal but a substantial difference of doctrine—the idea of union with more than one is fatally at variance with the idea of personality and responsibility in the government as the organ of the national life." And again, he says, " that the practice of manifold or indiscriminate establishments tends to throw public office more and more into the hands of the unscrupulous and thus aggravate the disorder from which it took its rise " (*ib.*, 112).

Such is the general defence of a connection between the state and some church, and among the competing claims, the inducements are strongest in favor of " the one Catholic and Apostolic church which providentially still holds and promises to hold among us [in England] the double sanction of ordinance human and divine " (chap. iii., 36).

The views of Mr. Gladstone in regard to the need of religion for the well-being of the state, to the duty of those who are entrusted with its government to act on the highest religious principles, to the power of Christianity to supply those principles, we readily accept ; but it is still a question in what way these great objects are to be secured. Might not all this be true and yet state and church best promote their common and separate interests on the plan of entire independence. Suppose even a revelation from heaven to be made to a statesman in a Christian land, enforcing the supreme importance of religion, and declaring that one particular church is either the only scriptural or at least the best form, might not the statesman want still further light as to the relations of this church and the state. Might not a further revelation, without inconsistency with the earlier ones, declare that there must be no organic connection between the two powers ; that

the best church and the most Apostolic, when standing alone, had the best prospects of success in the long run, and was eminently under the divine protection.

The subject then becomes a practical one exclusively. Of the subjects which meet us at this stage, such as the evidence from opinion in the past, both Christian and other, the evils of establishments from persecution and exclusion of dissidents, the evils of the voluntary principle, when it is exclusive, Mr. Gladstone treats in the subsequent chapters, but we have no time to follow him further. One remark only we make in leaving this and other works on church and state from the English point of view. It is, that the practical good sense of the nation has decided two points in the course of time: the first, that two establishments may coexist in two countries under one sovereign, both of them sustained and protected by parliament, which cannot be both right on the theory of the *jus divinum* of church government, if there be any *jus divinum*; and the *second*, that when an establishment like that in Ireland has ceased to be needed, it may be suppressed and pass out of the state's control. Thus it is shown that while the dissenting churches on the voluntary system are permanent, as far as public law is concerned; the great English church may be overthrown by parliament, or be subjected to such legislation that its best friends may wish for it a permanent separation from the state.

### § 261.

It has appeared from the foregoing statements, that all states until quite recent times have provided for the religious wants of the communities included in them, and that lawgivers have felt this to be a part of their office when called upon to construct or reconstruct plans of government. It has appeared that Christian thinkers have shared this opinion with the philosophers and sages of the heathen, that it has been felt to be not only a function which the state might perform, but which it ought to perform; and that the religious wants of the poor call for this state assis-

Conclusions.

tance. It has been felt even that a state, being a moral person, must follow its convictions in acknowledging God's being and providence, as also that a Christian state ought, in its institutions, to acknowledge Christ. And even in states which have no religious establishment, like the United States, the practice has long prevailed of setting apart annually, by proclamation of the chief magistrates, days of thanksgiving and of fasting, of opening meetings of the legislature by prayer, of having chaplains in the army and navy, in prisons, public asylums and hospitals; in short, there is a recognition by the community to which no one is forced, of a divine law and of a revelation. It is to be hoped that this will continue to the end of time, and that no tithing of the mint, anise, and cummin of a theory will interfere to procure its abandonment.

We have already admitted that, to provide for the religious wants of a people on the supposition that all rights are respected, is as much within the competence of a state as to establish a system of education. And if compulsory education is no violation of the rights of parents, but rather a defence of the rights of children, it would seem to flow from theory that children should have religious instruction furnished to them by the state, if their parents do not provide it for them. And to this we add that in many communities, as in the middle ages when the Catholic system was uniformly held, or in the colonies of New England and Virginia, where the new settlers were all of one way of thinking and worshipping, a state religion could violate no rights of conscience, and might otherwise, if the ministers of it were not controlled unduly by the state, do great good. In heathen lands, the state religion could not be oppressive, except where caste prevailed, and wherever new, outlandish rites awakened the suspicions of the government; for every man had his own special objects of worship, and the rites of the public *cultus* were mere shows and forms. But it is very different with monotheistic religions. They are in their own nature exclusive. They must look with repugnance on the association in worship of finite,



changeable, half-human entities and the infinite being; with disgust on mythologies such as have been shaped by human imaginations, and on the embodying of religious thought in material forms for purposes of worship. There is such an entire opposition between the two systems that they can scarcely exist side by side. One or the other must take possession of the state and rule alone.

Christian monotheism differs from Jewish and Mohammedan —at least in degree—in this, that by the grand  
Nature of Christianity produces divergences of opinion. doctrines of the incarnation and of redemption it has awakened the human mind to inquire into problems far transcending human speculative power, and for which the sacred books provided no solution. Thus, as man will speculate, there have been divergences of opinion on sundry metaphysical points, some of them called orthodox, some heterodox; which, owing to their connection with the moral-religious parts of Christianity, have had a great importance attached to them, or in their own nature are possibly hostile to the central ideas of the system. In addition to this, in the New Testament we find only the *cruda exordia* of church government, on which new institutions, with extremely slender authority for them in the apostolic records, have been built up. Hence, especially, more earnest discussions and more complete separations have proceeded, which the claims of conscience and of private judgment in religious matters have helped forward;—some contending that nothing besides what is found in the New Testament can serve as a rule of church order; others that whatever is not contrary to the words or spirit of Scripture can be engrafted on the forms of outward religion; and others still that the church as a unity, being animated by the spirit of God, can explain or develop doctrine and enact rules for practice. And when we add to these causes of division those which arise from the different significations given to the two simple rites instituted by Christ, we see that many differences of opinion, some of them irreconcilable, some attacking the authority of the state, have arisen in the world out of the simple gospel of the New Testament.

All this shows the grandeur and richness of Christianity—that it is too great in its conceptions to be grasped by the human mind, and is capable of taking many forms with one substratum. But does it not show also that state laws, founded on distinctions derived from orthodoxy or from a certain standard of church order, are nugatory—nay, rather that they must intensify dissension into bitterness, divide society, and perhaps threaten the very existence of the state? That (with all this) in certain circumstances a state church on a free footing for dissenters may be endured, or may be a blessing, is admitted. But let us look at what state laws touching religion have done or left undone.

They have influenced national policy disastrously, so that the leading causes in the war with the Albigenses, the Hussite war, the thirty years' war, the English rebellion, were religious. It does not seem probable that mere differences of confessional opinion, for instance in the thirty years' war, would alone have brought on that scourge of Germany; but the connection of the churches with the state certainly had much to do with the evil.

They have forced compliance with ceremony and ritual; and punished, even with death, persons who wrote against the state churches. In England, for a long time they shut out men from parliament—men otherwise qualified for serving the state—by the condition of taking the sacrament according to the forms of the English church. This act, it is true, was continually suspended in order to admit conscientious dissenters into the Commons; but it was a farce and a shame to keep such a law on the statute-book, if it ought not to have been put in force. They have also shut out from the privileges of taking degrees in the universities all who could not profess a faith in the articles of the established church.

They have established a church to which scarcely a half of the inhabitants who go to church belonged.

They have intensified religious rancor and hatred among the people, by lowering the estimation of dissenters and making them socially an inferior class.

They have acted unfavorably on establishments themselves, by taking away many of the motives for religious activity ; they have destroyed the independence of the clergy by making ecclesiastical dignities dependent on government ; they have made religious livings matter of sale, and enticed bad men into the church by the hope of promotion.

They have, in some countries, made the right of remaining in the country, for dissenters from the state church, to depend on the will of the sovereign. We have referred to the 30,000 Protestants driven from Salzburg by the prince-bishop. The emigration after the revocation of the edict of Nantes furnished 20,000 new inhabitants to the elector of Brandenburg's dominions, and sent 15,000 noblemen of the Huguenots, besides vast numbers of others, to various parts of the world. More than 100,000 are said to have perished in Languedoc during the Dragonades. Even emigration was forbidden, on pain of being sent to the galleys.

They have prevented intermarriage, and in some cases transmission of property.

They have caged together in one establishment opposite beliefs, or led men to sign subscriptions hypocritically, or produced a positive hatred, in the literary class, to Christianity. We are in favor of the largest liberty needed by tender consciences consistent with the genius of Christianity, and of a comprehensive church ; but it is a great snare to sign articles meant to be articles of faith, without the feeling of agreeing with them at least in substance.

They have given rise to the Inquisition, to the High Commission court, and to multitudes of persecutions.

On the other hand, religious laws of the state and establish-  
Establishments have failed of their end. ments have not produced unanimity or prevented dissent. Let us test this by the state of things in some of the best countries in the world. In England, where once it was hardly respectable to be a dissenter, it is estimated that one-half of the average number of attendants on public worship belong to this class of congregations, where the worshippers themselves pay for all expenses on

account of religion. In Massachusetts and Connecticut, where there were unusually mild religious laws, and hardly a dissenter was found among the original colonists, more than half the existing churches now belong to other denominations. It is the same with Virginia.

These laws have shown little forethought for the religious wants of the poor. In England, during the great changes consequent on the growth of manufactures, some of the old parishes increased immensely in population, without any adequate provision for the new religious wants of the lower classes. This vacuum, happily, was filled in part by the dissenting sects. Thus the great argument for establishments, that the poor would otherwise grow up in godless degradation, does not appear to have much force. As great an amount of destitution, at least, has been left unprovided for in London and the large towns of England as in the fast-increasing towns of this country, where more difficult problems, arising from the influx of foreigners of various nationalities and beliefs, are to be encountered.

Nor have establishments kept down unbelief either in the upper or lower classes, as both the Catholic and Protestant countries of continental Europe make it abundantly manifest.

Nor, again, have established churches secured discipline and purity of Christian life even among communicants. In the seventeenth century, Leighton, after his retirement into England from his see, while he thought that the English church was the best constituted in the world in relation to doctrine worship and the main part of government, looked on it, with relation to the ecclesiastical courts and the pastoral care, as one of the most corrupt he had ever seen. He thought, says Bishop Burnet, whose words I have used, "we looked like a fair carcase of a body without a spirit."

And indeed the best movements for the good of the church of England have proceeded, not from authority, but from voluntary effort. We need only refer to the vast sums contributed by members of the established church within a few



years for the repairs and building of churches, and for other religious objects.

On the other hand, while we freely admit that there are evils attending the voluntary system, such as rivalries of denominations, and intrusion into provinces already occupied, the activity of the system as shown in the United States is truly surprising. There were estimated to be in the United States about fifty-one thousand Protestant churches in 1871, to a Protestant population of thirty-three millions and a half, or one to six hundred and fifty persons. Multitudes of small places newly settled and poor are without Christian ordinances. The contest in such circumstances is a long and hard one between the ignorance and helplessness of towns rising in the wilderness and the energies of denominations to meet their wants. The conditions are such as have never been laid upon believers in the Christian religion before. Yet there is no doubt that the problem can be solved in the voluntary way, while no other efforts could have reached the exigency.

All things look in modern times towards the substitution of the voluntary principle in religion for the efforts of governments to accomplish the same ends. In the most truly Christian countries, such as England, millions of pounds are raised in this way in order to spread religion through heathen and other foreign lands. The same zeal would be equal to the greater work of sustaining religion at home. I do not doubt that it would be done. But I should not wish to see any national church disestablished, unless it were a thing of degrees, requiring a lapse of time for its completion. (Comp. § 129.) On the other hand, the voluntary system needs control, lest too much property should be concentrated in a single spot, lest the rights of inheritance should be invaded, lest the building of expensive church edifices should make demands for contributions which ought to be used for more spiritual purposes. A part of this control can fairly be exercised in the way of taxing church property, of limiting the amount that ecclesiastical corporations can hold, and of mak-

ing bequests for religious objects *in articulo mortis* invalid, at least beyond a certain amount (§ 121).

§ 262.

There is one relation between the state and the church of a very practical nature at present, which needs to be considered by itself. It is that which exists between all Christian states, especially those in Europe, and the religious power of the Roman pontiff. In the United States we can look on this question with some unconcern and impartiality, for every encroachment, or seeming encroachment, on the constituted order, every movement on a large scale, requiring combination of Catholics, would unite all non-Catholics together; and these, being many to one Catholic, could control elections; so that the real danger might be that in the contention of parties the Catholics would not have their fair rights. No exercise of spiritual power to the injury of the state could be of any effect unless there were some one in the country itself to carry it forward. If in the attempt he should do anything unlawful, he could be punished. If he exercised his lawful rights as a citizen in the way of proselytism, others must exercise theirs in contravention of his endeavors.

But it is conceivable that, in order to break the tie between his co-religionists and their civil rulers, a pope should adopt anew the old measures, so long laid aside, of excommunicating princes, laying lands under an interdict, and stirring up subjects to acts of disobedience. If the vast body of the people were with the prince and the state power, all that could then take place would be unlawful acts, separate or combined, each demanding the same treatment as any other act in violation of law. No new law need be passed. But perhaps there has been a connection more or less close between the Catholic church and the country in question. If in such circumstances an attack should be made on state institutions, and the struggle became one of life and death, the government would be compelled to do what so many have

done—cripple the church power by preventing it from having the use of property, by taking away the existing means of support ; in other words, by coming, as far as this religious body is concerned, upon the plan of voluntary support, leaving to it to do its own work in its own way, with the proper state provision against disloyalty. As for extremes beyond this, it must not be supposed that a war or insurrection excited by ecclesiastical arts has a right to different treatment from any other.

We cannot help feeling, however, that as the Roman power has always temporized, so it always will. Since the times of the nationalization of countries under one suzerain, it has lost one means of effectual interference in the affairs of states—that of taking the part of one power in society against another power, of turning to its own account that strife of elements that existed in feudal society. The national feeling is now so much stronger than it was in the thirteenth century, that it would surely prevail in a quarrel between the authorities of a state and ecclesiastical powers. Nor can it be doubted that a common feeling would pervade Europe when the question affected the independence of states.

### § 263.

We have still two points to determine : how far ought the state to go in protecting religious institutions, and are there any religious offences which ought to come within its criminal code.

1. Protection of worship can be put on the same ground on which the prevention of disturbance is put in any other case when men are gathered in lawful assemblies; and with still greater reason, because public worship is a great end, and an important means of religion, without which the vast benefits which the state derives from it, and the individual may derive, cannot be realized. The disturbance may proceed from enemies without or ill-disposed persons within the assembly. In either case it may be repressed by ordinary police regulations.

2. An association like a church, so vast and extensive, cannot do its appropriate work without the power of holding property. Here it is subject to the same laws in substance with any other corporate body. That it has a right to exist, that it is a necessary corporation, does not take away the need of control which is required in the case of other similar bodies. Here the law may fix the amount of property that can be held, as well as the amount that may be bequeathed, the trustees who are to be responsible for and to manage the property, and the purposes for which it may be used. Being also invested by its very nature with a power of visitation, the state must have complete power to examine books, to punish trustees for unfaithfulness, and, it may be, to depose the trustees and appoint others.

3. The amount of property capable of being held for church purposes may be limited. We have already referred to the statutes of mortmain; and the vast sums given by dying persons to the church "for the good of their souls" in the middle ages, seem to commend the rule that no bequests for pious uses on a bed of last sickness or death ought to be valid. The rule is an equitable one for the protection of families, who have not the same means of influencing a dying person that are within the reach of a minister of religion. And any church, if free thus to receive bequests from any source to any amount at any time, might ere long subvert or control a state. The amount which a testator ought to be permitted to alienate from his family (as we have elsewhere tried to show), should be a limited part of his property.

4. Again, it has been contended in this country that edifices of religion ought to be subject to taxation; while school-houses, hospitals, and all properly charitable institutions, as well the buildings as the funds yielding income, should not be taxable. The arguments are drawn from, and enforced by, the expensiveness of church buildings in this country, by the consideration that less capital will be put into a dead shape if a small tax is levied, and by the inevitable shyness that prevails in regard to the connection between state



and church, which shows itself in many absurd notions. The amount of capital put into church buildings, thus far, is said to be not more than 4 or 5 per cent. of the whole capital in the country, and is not likely to increase relatively to the whole amount. A tax would be apt to deter a poor community from erecting even a decent building for worship, perhaps would lead to delays in building which the society in the place would feel to its extreme disadvantage, and by raising pew-rents might deter numbers from partaking in the benefits of religion. The amount of taxes being increased by those levied on the houses of worship would tend to lower the salaries of ministers, which in the country towns are now quite low enough. For such reasons a tax on church edifices in general ought to be rejected, as every way injurious; but if one were levied on edifices costing beyond a certain amount, it would seem to be no hardship—at least, if the rule were to be adopted in regard to buildings to be erected. Burial-grounds attached to churches, manses, church schools, and church hospitals, ought to come within a general law affecting property used for like purposes.

The purposes for which religious property may be used are to a certain degree within the control of the law. The most important class of cases that would here be affected are establishments for persons under vows leading a common religious life. The objects for which they are congregated, whether they be sacred learning, or simply a private religion in common, or education, or help of the afflicted, may be highly laudable; but, for all that, it is right that institutions which have had such histories as the monastic ones, which good Catholics have condemned and Catholic princes have suppressed, should not have full power to propagate themselves over a country. The considerations, however, which would require a limit to be imposed upon them, are by no means narrow and sectarian; they are supported by the experience on the whole which history offers us when it condemns such institutions on account of the idle lives of the inmates, and the conception of character which such a kind of piety

is apt to plant in the minds of a nation. Perhaps the best way of managing them might be to fix a limit of property and reserve the power of suppression to the state.

5. Apart from these more striking cases, there are multitudes of others where questions touching the church or churches of a land must come before the courts. Such are disputes between rival sets of trustees touching the right of managing religious property ; questions touching the contract between a minister and a people in regard to the payment of his salary, or to other points in the contract of settlement ; questions of orthodoxy in a case where a certain part of the pew-holders or church-members contend against a minister or trustees that they are untrue to their declarations of faith made on taking office ; or such as relate to the right to use the church edifice for certain purposes aside from religious worship, and so on. Disputes of this kind must sometimes arise in vast Christian denominations, which are capable of holding property and making contracts. But the principles of law and equity on which such disputes are decided by state courts are none other than well settled legal principles, applicable to similar cases arising in secular corporations and associations. To which we may add that the courts are comparatively impartial ; while church courts, where a case strongly interests a community, would be unsafe arbiters and by no means fit to be trusted.

#### § 264.

In many codes of laws we find crimes against religion punished with severity. Instances drawn from  
Crimes against religion. Athenian law have been given already, and it has appeared what penalty Plato and Cicero would impose on offences against religion. The author of the treatise concerning virtues and vices found among Aristotle's works (chap. vii., Didot's ed., ii., 246), calls impiety or *ἀσεβεία* one of the three kinds of injustice, and defines it as a fault towards the gods, dæmons, the dead, parents, and country. The Hebrew law punished blasphemy, *i.e.*, as it is defined in Lev., xxiv.,

16, the crime of using the name Jehovah with irreverence and abuse, by stoning ; while other kinds of cursing were left to the judge to visit with penalty (*ib.*, v., 15, comp. *Exod.*, xxii., 28). Other crimes against religion, as worship of idols and false gods, partaking in heathenish worship, witchcraft and divination, profanation of the Sabbath, false claims to prophetic inspiration, had their appropriate penalties. In the laws of Manu crimes against Brahmins are punished with special severity. Thus “ a once-born man who insults a twice-born with gross invectives ought to have his tongue slit, for he sprang from the lowest parts of Brahma ; ” and “ if he mentions their names and classes with contumely, *as if he says*, ‘ Oh, Dévadatta, thou refuse of Bráhmins,’ an iron style, ten fingers long, was to be thrust red-hot into his mouth.” (viii., 270, 271 ; comp. 273, 283, Haughton’s Jones’ transl.) The laws of other heathen nations show that religion was protected by criminal law, but still more does this appear in Christian codes. The offences against God and religion under English law may be found in Blackstone, book iv., ch. iv. Some of them are altogether obsolete, others are approaching to that condition. The crime of apostasy, or of denial on the part of one who had been a professed believer in Christianity exposed the person in question to several disqualifications, as late as 9 and 10 William III., and on a second offence to imprisonment for three years. Heresy, also, with the writ *de heretico comburendo* supporting the law, in force until 29 Charles II., shows that protestant England followed Catholic precedents. Blackstone does not wholly object to laws against propagating heresy. Laws, also, against nonconformists and papists were enacted to protect the established church and the civil state. Laws against sorcery and witchcraft continued until the ninth year of George II. (1735). Laws against blasphemy, swearing and cursing, simony, religious imposture, desecration of the Lord’s day by work, are still, we believe, on the statute book ; and in similar legislation the first American colonies, especially the puritan, followed the mother-country. But a great part of all these crimes have disap-

peared from the statute books. I have a code of a puritan state now lying before me, in which the only crime against religion is blasphemy, which is defined as directed "against God, either of the persons of the holy Trinity, the Christian religion, or the holy Scriptures," and is punished by a fine of not more than one hundred dollars, and imprisonment for not more than a year. The offender may also be bound over to his good behavior. This offense was punished in 1642 with death, which in 1784 was changed to whipping and the pillory, and in 1821 was punished as it is now. There have been also, in a small number of states, disqualifications for political office arising out of atheism, disbelief in future rewards and punishments, or even in the Christian religion. But all these are passing away.

Why is it, we may now ask, that any offences against religion are noticed by the law of the state. Various reasons may be assigned in particular cases. It may be said of the Hebrews that the theocracy made God the ruler of the nation; the need of rest and quiet may be alleged for Sunday laws; the malice of sorcery and witchcraft for laws against these practices, and so on. But I believe that the original feeling was that the offence deserved divine displeasure without any due discrimination between the spheres and ends of divine and of human law; to which may be added the fear that the Most High would not favor the community, if his rights and honor were not protected. Then followed the true conviction that faith in divine power was a main pillar of the state, which naturally led to state laws in favor of religion of various kinds, the greater part of which only injured what they were intended to support.

1. The laws against blasphemy rest on a reasonable foundation. The offence does not proceed from a calm state of mind, but from malignity, and it hurts the feelings of believers in God or the Scriptures more than it would if the character of deceased parents were aspersed. It serves no purpose whatsoever. It destroys respect for religious truth, which is a principal support of the state. For these reasons



the unanimity with which the law of Christian states forbids it can be justified.

But no laws against the propagation of opinions on religious doctrine, when these opinions are supported by calm argument, can be defended, except in the extreme case when such propagation attacks principles which are necessary or are judged to be necessary for the existence of the state itself. Thus, it could not have been regarded as worthy of blame, if the pope's primacy had been attacked within the ecclesiastical state, to make such an attack punishable by law, for church and state were bound up together. On the same principle, the theocracies of the Jews and of other parts of the world might be protected. By the close tie between the religion and the civil state, an offense against one became an offense against the other. Just as words spoken against the king are actionable in a monarchy when similar words uttered against a chief magistrate in a democracy would not be, so the theocratic form makes necessary for its own existence a wider control over human action and even human thought. The only question can be, ought such a government to exist? That its existence, though exceptional, may be necessary at certain stages of human culture and for certain purposes, I should not dare to deny.

If we pass beyond blasphemy, there is, I believe, no crime which is punished as a religious crime directly, and as injurious to society on that account. 2. *Perjury* calls in, for the aid of testimony before courts, the belief in divine knowledge and of abhorrence of falsehood. But it is punished rather as a crime obstructing the administration of justice, than on account of its religious character. The state makes use of a faith in God which the witness professes to hold, although even the existence of a divine being may not be mentioned in its instrument of government. And it punishes perjury more than it would naturally punish bare false testimony in the same circumstance, because it is an extreme crime. 3. *The violation of burial-places* is a crime like burglary against human property and public order; but a reason for estima-

ting the crime as being greater than that of burglary might lie in the family affections and in a certain veneration for the departed. It is more causeless and more against nature than most other crimes that men may commit. 4. *Sacrilege*, again, as being properly the stealing or robbing of property consecrated to sacred uses out of sacred places, and as including all malicious defacement and other injury done to such places, may be called a crime against property ; but the feeling of mankind goes beyond this estimate of its guilt. It is what blasphemy is in words—an irreligious treatment of sacred things. The two feelings must coexist, and the abhorrence of the crime on religious grounds must to some extent influence legislation. 5. *Sorcery and witchcraft* were most righteously punished, when they were believed to be means of injuring life, and were practised for the hurt of human beings through devilish or dæmoniac agency ; but the fault lay in the belief that these crimes drew any real support from the invisible world. With the present opinion they would go unpunished, not as not aiming to secure their end by malicious practices, but as being ineffectual because no one believes in their efficiency. 6. And here it may be suggested that *religious imposture*, like other kinds of imposture, is properly amenable to the law. 7. Finally, *laws for the observance of the Lord's day* are justified only so far as the usages of society render a suspension of business necessary on that day, and as public meetings for quiet worship require protection against noise and tumult. Thus, all civil processes and proceedings in courts may rightfully cease, and no enforcement of payment of notes takes place in most Christian countries. It is of course in conformity with the prevailing religious faith that such laws are made ; but men have a right to exercise their faith, at least when they take part in public worship. Besides this, a day of general rest does vast good to soul and body, and the legislator may rightfully protect the religious institutions of a country, for the vitality of which common worship and a day of rest are indispensable, by appropriate legislation. Those, however, ought to be left

free to take their own course who pay no regard to the Lord's day, if only they do not disturb or interfere with the rest or worship of others.

On the whole, while laws against irreligious acts notice them in part on account of their human evils, I cannot help finding in them another element, proceeding from religious feelings themselves, from reverence to the divine being irrespectively of their injury to human society. Man, in his legislation, cannot get rid of his sentiments; even in the later attempts at legislation, when the limits are more exactly drawn between that which is injurious to society in some specific way and that which is sinful, the sentiment will assert its right in defining crime or in enhancing punishment.

## CHAPTER XIII.

### INFLUENCE OF PHYSICAL AND SOCIAL CAUSES ON POLITIES, AND OF POLITIES ON THE PEOPLE.

#### § 265.

The ancient political writers were wont to speculate on the power which physical causes exerted in shaping or changing the forms of government. If, for instance, a newly settled town or colony lay on a noble harbor with productive lands behind, a Greek would be apt to think that sooner or later the place would have a democratical government, on account of the influence of the commercial class. On the other hand, an interior town might be kept from the predominance of a democracy, and this would be a motive for planting a new colony in such a position. The various influences from external nature they were well able to estimate, and those from race they were disposed to estimate too highly, for they set themselves with their free institutions, arts and letters over against the barbarians, who were fit only to be slaves, forgetting that ages of cultivation might have raised Cappadocians or Scythians more nearly up to their level, and rendered them fit to be freemen.

Among modern writers, Montesquieu was the first to show on an extensive scale what the spirit and character of laws and institutions are, as exposed to various influences, and what the qualities are which different forms of polity cherish. As drawing attention to the historical side of politics, the "Spirit of the Laws" marks an era, but the deductions—where causes so complex and belonging to ages so unlike one another as those which give shape to politics—are often very questionable. Thus, it may happen that laws and institutions may pass over



from one kind of polity within a race to another; or that they may travel far beyond their birthplace, as Roman law has helped to shape the codes of a large part of Europe, and the jury has spread beyond its original seats. It is dangerous to pick out one cause—a physical one, for instance—and assign to it a great share of formative power in a constitution, for presently religion, perhaps introduced from abroad, culture, arts, and other forces will begin to set up their pretensions, and to claim a share, if not the largest share, in national progress. It is difficult, then, to determine the relative weight of physical and social causes, of domestic and foreign influences, of political and social ones, which everywhere act and react on one another; or the power of imitation and fashion at a certain age and in a certain country. Of course our experience and prophecies founded on it are very uncertain guides beyond certain narrow limits.

Without doubt—to confine ourselves now to causes of a physical kind acting on governments and institutions:—man cannot escape altogether from the influences of the external world. The free in his nature and the necessary from without must act together in forming the institutions which are the results of his choice. Sometimes these forces concur, sometimes they act in opposite directions; and in the latter case, if he has energy and tenacity of purpose enough to overcome nature, it proves to be his greatest friend; it helps in the formation of a national character hardened and ennobled by the resistance.

Let us consider some of the natural causes, and try to discover in them an influence on a polity, either to originate or to alter it.

1. *Influences of climate.*—The greatest extreme of cold prevents all marked development of the political instinct. There are regions where man lives on the confines of death, where his constant struggle is to fight against nature and just maintain life. In such climates there can be little property, and little new knowledge to stimulate to better methods of labor. There may be family life and small societies, but the

difficulties of finding subsistence scatter men over a wide surface. Thus states, properly speaking, neither can exist nor are wanted. Nor can there be much improvement in condition from abroad, for strangers from lands of higher civilization rarely go into the regions within the frozen zones, and can bring no instruments by which industry can be advanced, since little growth is possible in such a climate. Government, there, must be confined to family and social usages, and apparently would be so confined within a century or two, if a cultivated race had been driven into those frozen solitudes without opportunity of communication with their old homes.

The other extreme of torrid climates, by making a little labor supply natural wants, and by enervating the body, destroys the principal motives to exertion. A little clothing and fuel, shelter from heat and rain, alone call for contrivances to make exertion tolerable and light. Yet here the social feeling gathers numbers near one another, unless in arid regions, and the family as well as political institutions may flourish. If the tribe or state is near the coast, industry may be awakened and civilization may come in from abroad. Yet, in most of the countries where the heats are great nearly through the entire year, only despotic states are found and scarcely any political capacity. The climate is against resolute assertions of the free spirit, and men of especial endowments or advantages, getting the power into their hands, rule as military tyrants. Yet it is not certain that such climates in the end will be able to resist the influence of civilizing and elevating causes imported from abroad.

Between these extremes there is a great variety of temperate climates, or of such as by the alternations of heat and cold stimulate the inhabitants to industry and providence. It is necessary to lay up stores for winter, and to work in the other seasons, if husbandry is the occupation; and the pursuits of a nomadic life require attention through the year to the state of the flocks, and to a shelter against the extremes of temperature. If the political forms of the higher races are

not developed here, the cause is not owing to the inability of man to contend with nature.

2. *Soil*.—This is important in its political relations, from its determining in a degree the occupations of the people. Yet many wild tribes make hunting or even fishing their occupation, when the soil which they control might yield them a rich variety of products. The soil supplies motives to industry where exchange with neighbors can be carried on, and determines thus in part whether a people shall be nomadic or agricultural in its pursuits. The mode of life in turn determines in great part the political condition. A nomadic people is composed generally of tribes with no compact union, and has no incitements to a higher kind of civilization, unless some man unites them together by his superior genius. Then the desire of conquest, for which their roving habits fit them, may bring them into new conditions of life and effect a change in their political capacity. It is probable that the Slavic and Germanic tribes were principally nomads, and it may have been causes not arising from their state of life at home that led to their change of abode and ultimately to the alteration in their political and industrial habits.

3. *Situation*.—This is a cause which renders a certain kind of life easy or difficult; which stimulates or represses the curiosity and the hopes of men; which opens the way into city life, or makes intercourse with remote parts almost impossible in the early periods of human culture; and which thus indirectly has more influence on political institutions than almost any other physical condition. A navigable river, the presence of the sea with convenient bays and harbors, such a sea as the Mediterranean, thrusting itself into the heart of continents and furnishing access along thousands of miles of coasts; or, on the other hand, interior table-lands, high mountain chains, forbidding colonists from scaling their heights, have vast power to quicken or retard knowledge intercourse and the motives to increased production; and to lead to or prevent higher political organizations. Yet a certain degree of knowledge—the beginning of the art of ship-build-

ing, for instance, must be presupposed before the favorable causes can have effect. Other situations begin to manifest their influence on the political forms at a yet later period than these. The choice of a place near a good harbor for a city implies that already navigation is profitable ; and the selection of it at a little distance from the coast implies already the danger of hostile invasions from the sea. Insular situations and the defence that islands furnish to their inhabitants, help colonies there to grow in security from all attacks but those of pirates. That navigation has made progress implies the concentration of various useful arts in one place, and here we have two sources of city life. Even a barren rock may be turned into a city, if navigation and land transportation across a continent furnish supplies for the masses gathered together.

4. *Races*.—Some of the leading physiologists have considered the human race to have a unity beyond that of a common nature with its faculties, sentiments, and desires—a unity implying descent from common ancestors.\* But the differences of race cannot now be assigned to their causes, and the differences of language are yet greater and quite as inexplicable. To a considerable extent, again, races may have become mixed in remote ages, so that the characteristics of race are made yet more difficult of definition. Race, again, may coexist with peculiarities of climate in producing differences where it may be unsafe to assign to each factor its share in the result. Thus much, however, may be said : that race, which must have something to do with external nature, is attended with characteristics which are, if not unalterable, at least slowly changeable. Within the same race, again, there are subordinate characteristics, and in each nation of the subordinate divisions of the race, national characteristics which are not all due to external nature. How strikingly unlike the Celts, the Slavonians, and the Greeks of the one Indo-European family. How unlike the Frenchman and the English-

\*Comp. A. von Humboldt, *Cosmos*, vol. i., p. 361, Otté's transl. Lond., 1848.



man. These differences cannot fail to have something to do with the leaning towards different institutions, with the fixity or the unsteadiness of habits, with moral characteristics. Differences of mental and moral natures, such as Greece and Rome show, appear in the earliest records of the two nations, yet they are in language and religion nearer than either is to the rest of their race. Race acts as a predisposing or preventing cause, which may be overcome in a long course of time, so that the same political forms can make their way amid all the varieties of races and peoples. The actual success of missionaries in bringing individuals of all races and tribes to receive Christianity with a common understanding of its spiritual ideas, not only shows the unity of man in his varieties of race; but we may argue from this reception of common religious ideas and hopes, and from this submission to a common law of life, that political ideas also may circulate over mankind so as to bring about, if not the same forms of government, yet such as are animated by a common spirit of justice and of liberty.

### § 266.

When a form of government in a country has lasted from age to age, it cannot fail to have had a decided influence of its own upon the character of the nation, and to have modified the other moral causes that affect national character. We shall endeavor now to see if we can find out what these influences are; which is not always an easy task, because, when a quality of character is prominent in a nation, it may be that other causes besides the government have aided in producing it. Those causes, for instance, may have been of earlier origin than the government itself, and may be able to stand their ground for centuries against others of an opposite character.

We begin our discussion on the influences of different forms of governments by looking at Montesquieu's noted remarks upon their principles, which occupy the third book of the *Spirit of the Laws*. There is this

Influences of different polities on national traits of character.

Montesquieu on the principle of governments.

difference, he says, between the nature and the principle of government: its nature is that by which it is constituted, and its principle that by which it acts. As for the nature of governments,—which he divides—illogically, as we have seen into the despotic, monarchical, and republican, the latter including aristocracy and democracy,—it depends, for the first species, on the arbitrary will and law of the single ruler; for the second, on the fixed and established laws of the single ruler; for the third, on the fact whether a part or the whole body of the people is possessed of supreme power. This division is illogical, it is obvious, because there may be aristocratic and democratic tyrannies as well as monarchical ones. But of this we have said enough elsewhere, and the incorrectness of the division does not seem to affect his remarks on the principles of a government. The principle of despotism he makes to be *fear*; of limited monarchy, *honor*; of aristocracy, *moderation*; and of democracy, *virtue*. At the end of the book he is careful to notice that these principles do not always actually exist and have a controlling power in a given state; but simply that men ought to be virtuous in a republic, to be actuated by honor in a monarchy, and in a despotism, by fear; “otherwise the government is imperfect,” that is, does not correspond fully to the conception implied in its name. It would be more true to say that the government cannot sustain itself without the special support of virtue, fear, etc.; and that if virtue, *e.g.*, exists with fear in a despotism, so much the better; each of these is a governing, essential principle, but not the sole principle.

Let us look at Montesquieu's explanation of his doctrine, in the order in which we have mentioned the four forms, which is, however, the reverse of his own. By *fear* he does not mean the *prince's fear of his subjects* and ministers—although a suspicion leading to vigilance, something like fear, must in fact be his safety against plots—but *their fear of him*. “When the despot for a moment ceases to lift up his arm, as soon as he cannot at once crush those whom he has entrusted with the highest places, all is over with him.” “It is neces-

sary that the people should be judged by laws, and the great men by the caprice of the prince; that the lives of the lowest subjects should be safe, and the bashaw's head always in danger." Obedience in a despotism must be unlimited, and rendered in a spirit of fear; everything but religion will be made to yield to the despot's will; then a higher fear counteracts the fear of him. Honor cannot be a principle of despotism, for it implies distinction of ranks, and all are on a level under a despot; he will, if he can, break up a hereditary nobility and have no distinctions save official ones. "Honor glories in contempt of life," but the prince expects to terrify by having life and death in his hands. Honor has fixed principles which counteract the mere caprice of a tyrant. Honor, we might add, adheres on principle to truth, but fear leads to falsehood and to dissimulation. "As for virtue," says Montesquieu, "it is not necessary in a despotism, and honor there would be dangerous."

To this account of despotism, pure and absolute, there is little, on the whole, to object. It controls by the meanest principles of our nature—it teaches universal falsehood and distrust. In the end it awakens dread in the tyrant's own heart, makes him resort to cruelty, and then fills him with remorse.

The principle of monarchy is honor, according to our author, but he is not careful to give an exact notion of what he intends by the word. It is a quality which resides in men of rank and of a noble descent. It aspires to preferments and titles, and is therefore associated with this form of government. Ambition, which is pernicious in a republic, has some good effects in a monarchy. "It may be called the prejudice of every person and rank, and is capable of inspiring the most glorious actions; and when joined with the force of the laws may lead us to the end of government as well as virtue itself." "In monarchies policy makes people do great things with as little virtue as is necessary." In well regulated monarchies almost all are good subjects, and very few, good men. The courtiers of his time Montesquieu speaks of in

the most opprobrious terms. "Ambition joined to idleness, and baseness to pride ; a desire of obtaining riches without labor, and an aversion to truth ; flattery, treason, perfidy, violation of engagements, contempt of civil duties, fear of the prince's virtue, hope from his weakness, and above all a perpetual ridicule cast upon virtue, are, I think, the characteristics by which most courtiers have been distinguished. So true is it that virtue is not the spring of this government."

If one may unfold Montesquieu's meaning more clearly than he has unfolded it himself, he would need to define more clearly what honor means. He would find it necessary to say that instead of being a substitute for virtue it is a form of virtue, that it consists in a delicate sense of the value of character, and a high standard of character. It is not merely a purpose to conform to that which public opinion in the higher classes demands, but to possess within one's self the conception of a noble character or a character thought by the individual man to be such, and the intention to realize it in life. The man of honor hates all that is mean, base or unworthy of a man ; above all, untruthfulness, unfaithfulness, cowardice, especially moral cowardice, and is ready to do what is right in spite of all obstacles. It is not the sum of virtue, but is an admirable and beautiful side of it. Now this ideal of an important quality can thrive best among those who are cultivated into a delicate sense of right by refined literature, high examples, and reverence for God. If the highest class offers such examples, honor will be more keen there than in other classes, if it is corrupt as it was under Louis XIV. and XV. when Montesquieu lived, or under Charles II. of England, the meanest of men will proceed from such a school, however high their birth ; and the common people amid vulgar employments, by the effect of religious principles, will have a higher standard by far of real honor than the nobility. That a high standard among a nobility may have great power to elevate a whole people, to make them loyal, truthful, courageous, independent, and even unmercenary, cannot be questioned ; but how can one safely



say that virtue is not needed as a principle in a monarchy? Could Montesquieu have lived long enough to see the revolution in his own country, he would have perceived without fail that the loss of moral principle was one of the leading causes that brought it on.

§ 267.

Honor, or the being “sans peur et sans reproche,” is allied to loyalty, and the two as special forms of ethical principle took their rise in the middle ages from the ideal of a perfect knight, which was really a Christian idea, and the noblest contribution of the middle ages to practical morals. Loyalty, however, was directed towards a person, so that now, wherever the people is held to be the fountain—even if only the ultimate fountain of power—its force is somewhat weakened. The only substitute is a somewhat more abstract system of rules of honor; a standard of character including the virtues already named and whatever others are conformed to the true idea of manhood and diffused through society by means of a high-toned literature. In this shape the minds, out of which loyalty in its old form of personal allegiance had nearly faded, could be trained into a truly honorable life both in a republic and in a democracy.

De Tocqueville (Democr. in America, ii., book 3, ch. 18) continues the speculations of Montesquieu in the chapter entitled “on honor in the United States and in democratic communities.” His main proposition is that “the dissimilarities and inequalities of men give rise to the notion of honor; that this notion is weakened in proportion as these differences are obliterated, and with them it would disappear.” He lays it down that in “a democratic nation like the Americans, in which ranks are identified, and the whole of society forms a single mass, composed of elements which are all analogous, though not entirely similar, it is impossible ever to agree beforehand on what shall or shall not be allowed by the notion of honor. As it is imperfectly defined, its influence

is of course less powerful. Public opinion can only pronounce a hesitating judgment. Sometimes the opinion of the public may contradict itself ; more frequently it does not, and lets things pass." . . . " In aristocratic countries the same notions of honor are always entertained by only a few persons. . . . They apply its rules therefore with all the warmth of personal interest, and they feel (if I may use the expression) a passion for complying with its dictates."

I have here nothing to do with the United States in particular, except as an example ; and will only say on that point that the delicate attention to the female sex, the outward expressions of respect which individuals show to one another, the tender humanity which marks the most cultivated parts of the land, show at least a susceptibility to honor and other refined sentiments. As for the rest if, as De Tocqueville says, the same notions of honor are entertained by only a few persons, of what great use are they in a nation whose character and general life they are thus unable to pervade. And if, as happened both in France and in England, under Louis XIV. and his successor, and under Charles II., the highest class was the basest, what stability or self-recovering power is there in a sentiment or a standard of character which has gone out of fashion. The better opinion, as it seems to me, is that the true sense of honor rests on immutable moral sentiments, that it decays with public morality in an ill-governed community, that it revives with an elevated philosophy and with a return to the standard of a high Christian life, and that then it acts on life through literature and example as the baser notions of honor had acted through a base literature and with a low moral standard before. A democratic country must be confessed to be less favorable to the sentiment of loyalty, perhaps to courage, and certainly to reverence, than an aristocratic one ; but it has this advantage that whatever is there received as true and manly, the impression spreads fast and wide, just as the fashions do ; that there are no torpid Bœotian classes from which influences bound back, and that while the causes that act on life and sentiment do begin

there in part from below, they begin also from above and penetrate downwards more easily. Unless then it can be shown that the most refined classes in a democracy are insensible to the feeling of honor, it will follow that it ought to have a wider spread through society there than elsewhere.

But we return to Montesquieu, who remarks that virtue is necessary in an aristocracy, but not so necessary as in a popular government. The soul of an aristocracy is moderation, by which he intends that the nobles, as a class, keep themselves within due bounds, that is, keep their place within their own order. "Such a body, however, as this, can restrain itself only in two ways: either *by a very eminent virtue*, which puts the nobility in some measure on a level with the people [that is, keeps them from widening the distance between the common class and themselves], and may be the means of forming a greater republic; or *by an inferior virtue*, which puts them at least on a level with one another, on which, indeed, their preservation depends." The justice of this remark is made apparent by the histories of many small aristocracies, in which the upper class was divided into factions, and the weaker or more popular of the two threw itself on the common people for support.

The need of virtue in a democracy is proved by Montesquieu from the consideration that the same power which makes the law in such a state executes it also; there is no superior will, when the people is opposed to having the law enforced, which is able to enforce it; yet without this enforcement the state is undone. In a monarchy or an aristocracy the monarch who breaks the law himself, or the upper class, does not lose the interest to maintain it as it respects other members of the state. "When virtue is banished, ambition invades the hearts of those who are disposed to receive it, and avarice possesses the whole community. The desires now change their objects; what they were fond of before becomes indifferent; they were free while under the law, and they will now be free to act against the law."

We cannot, however, suppose a whole community to be

come so corrupt that all will wish for general license. All the wealthy, for instance, all that are pursuing their callings in peace, must feel their interests to be at stake, and will maintain them if possible. No body of men ever became so corrupt as to rush into ruin; it is the predominance of evil, and the hopelessness of good, which destroy a state. It would be truer to say that loss of morals, looseness of principle, will destroy any state; even a despot could not maintain his power, if all his officers were worthless and saw no advantage to themselves in adhering to his cause. Montesquieu's great mistake consists in thinking that any state can long maintain itself in a general decay of morals, but he is right in conceiving that a democracy without virtue would perish soonest.

### § 268.

We proceed to consider some other results and characteristics of different polities, but shall class them Other influences of different polities. under the general heads of absolute and free government. Then it would be necessary for the sake of completeness to take into account also the simplicity of manners and life, the amount of wealth in the community and its distribution, the vitality or deadness of religious faith, with other influences widely acting on national life. There is also, as we have discovered already, a great difference between a large community acting through its representatives and a small city-state, where, if the relative strength of opposing and jealous classes be not manifest to all the citizens, the greatest political disorders may exist together with all the immoralities that grow out of suspicion, resentment, and constant intrigues. Civil war is everywhere full of evils, but no such deep degradation of any state with a wide territory could equal that of the city-states of Greece as it is depicted by the great historian of the Peloponnesian war (Thucyd. iii., 82, 83).

Rome shows us the necessity of cautious separation of the causes lying in the polity itself, from those which change the character of society proceeding from some other quarter. The early government of Rome after the consuls were set up



was in some respects intolerable, and the strife of orders fierce; yet how severe were the morals of this unlettered community, how sacred the marriage tie, how rare divorce,\* what a spirit there was of thrift and frugality pervading the whole society. But in later times, when the polity was more just and equal, the morals were vastly worse.

1. One of the chief differences between different governments consists in the ease or difficulty with which individuals can acquire wealth and change their condition in society. As wealth means the power of self-gratification in any way, as well as higher social position, no motive can be more comprehensive. There is a stream of adventurers from the humbler classes, not content with the life their fathers have led, pressing on to fill positions in mercantile and professional life; and where education is diffused in a free country, their numbers and zeal will be so much the greater. If, as in England, there is a well-born and titled class into which they can scarcely hope to be admitted, this will be a barrier in one direction; but the middle class, as has been remarked, in England, will be so much the more eager to raise themselves by the pursuits of industry to an elevated position in the world. This class there is the zone of hope, lying between the zone of listlessness and despair, and the zone of contentment.

In proportion to the power of bettering their fortune by personal endeavors will be the energy, restlessness, hopefulness and discontent of those who are climbing the ladder. In a country like the United States this stimulus to exertion is exceedingly strong and far diffused. Its effects are, some of them, very good, and others very evil. It produces specimens of covetousness, thorough earthliness, unreflecting pursuit of ends even by the rashest speculation, such as the absorbing desire of the goods of life naturally excites. With this are joined the vices that grow out of cupidity, and the

\* Even if we refuse to believe what D. Hal. says, ii. 25, or suppose, as we may, that for other causes besides barrenness divorce was practiced before. Comp. A. Gell., iv. 3, who gives his authorities.

willingness to forego those relaxations from care which would partially relieve the gnawing of unsatisfied desire and discontent. Under the sway of such eager hopes many, stretching themselves beyond their capacity, or overtaken by public calamities, lose what they gained. Nor is the hopefulness and restlessness in a democracy confined to business pursuits. As all offices are open to all, the aspirants are by far beyond the number that can succeed. This is one of the causes that act on party and the management of political affairs in this country, of which we shall have occasion to speak in another place.

The same causes act in monarchies and aristocracies where all can rise into wealth or distinction, or, at least, where there are no disabilities imposed on individual effort by the constitutions. But there is here more stability of social position; the laborer's child grows up expecting to pursue his father's craft, and a certain caste-like form is given to life. Hence one recognizes here these distinctions of class by distinctions of dress and manners, of speech and turn of thought; while in a country of entire equalities individuals may differ vastly, but the dividing lines of ranks or conditions are far less marked. There is thus, although no hereditary line, yet a fence which it requires more than ordinary courage and hope to leap over. Many instances may be given, indeed, of men with small advantages at birth rising from an humble or a middle condition by success in business or manufactures, or by professional or military skill; but these are exceptions rather than rules, in states where settled orders exist. One cause of their fewness is, perhaps, the neglect of the education of the lower classes which once existed in countries where political and social inequalities are marked.\*

\* It ought to be added that political institutions are not the only causes of energy, restfulness, and covetousness, nor can they alone give rise to these qualities. Where profits are large and land cheap, the stimulus to industry will be great; where land grows dear and profits fall, there will be more patience and less of a speculative spirit. This state of things may exist under any form of government. It is plainly the best condition for the morals of a people.

2. The influence of equality as it regards state rights will necessarily be expressed in manners and character. One effect of it is the higher character of the lowest class where it is not depressed by the feeling that they can never reach respectability. The possession of political rights, or the prospect of reaching them by temperance and thrift, is a cause of self-respect, and leads to the respect of the rights of others. This brings with it a general civility of manners, and caution in regard to giving offense to others, which free intercourse might otherwise make easy.

On the other hand, the greater the equality of political condition in a country, the greater is the want of *reverence*. This was long ago remarked upon as a characteristic of Athenian democracy, that old age did not meet with the same respect there as in some other Greek states, that the subordination of the young to the old was injured by the institutions of the city.\* The same feeling is carried into the outward manifestations of religion, among Protestants, and, most of all, in those denominations which have a democratic government, or are especially religions of the people; there is a want among us of those sentiments of veneration and reverence with which the ancients strove to inspire the young by a strict discipline of manners.

3. The more free a state is in its polity, the more law-abiding is the spirit of the people. It is true there may be a stolid obedience in a despotism dictated by fear, ignorance, and a sense of weakness, as well as a reverence bordering on religious awe; but there is little of a feeling such as a free man under political institutions ought to entertain towards law and its ministers. It may be plausibly said that they who make the law, and yet have not reason and reflection enough to perceive the necessity of obedience, will be more ready to break the law than others; but the institutions of a free government,

\* Xenophon (respubl. Athen., I., 1. 10-11) says that "at Athens a slave will not stand out of the way for you," and that in Lacedæmon "my slave fears you."

as I think, educate many men who are qualified to cast a vote, into the habits of obedience. That they chose the representatives who make the laws is surely no good reason why they should disobey the laws. Their sense of privilege will rather identify them with their country, and thus they must condemn more emphatically whatever injures it.

4. The desire to be educated and the extension of education is somewhat in proportion to the spread of political rights in a country. It is true that in a representative government there is not exactly the same educating power in the political direction as in a city-state; nor does reading, which a person resorts to for himself, educate as effectively as the ear and the presence in a public place where many are instructed at once. The dramas of the poets, the works of statuary, the pleadings before the courts at Athens, the discourses from the *bema*, were quickening in a higher degree than any public spectacles or entertainments of modern states, and thousands underwent together a refinement of their tastes, an awakening of their intellects unknown in modern times. The finish of the best dramas, and of the pleas made in law-cases by the orators, shows that there was a demand for highly-wrought works of great masters. This we attempt to supply by schools and colleges, by books and newspapers, but we fail to reach the cultivation of taste and of thought which was attained in the best days of Athens. But the education offered to all, and the course of self-improvement that may follow, are the results of free government and of a thoughtful religion. The government is not afraid to educate the mass of men through fear of their demanding political power; but, having conceded to them the power, desires to have them trained into habits of reflection and moderation. The lower class of the people discover what education can do for their children's advancement, and think it one of the great blessings of a free country. Then follow public libraries in city and country, such as are growing up in our land, and are destined to become universal. The opportunities of preparing for special employments in the beautiful and the useful arts, by an education at a small



price, are among the chief advantages of the polities where the people govern themselves.

If, on the other hand, it were alleged that states with a leaning towards aristocracy neglect the education of the common people, it would not be wholly true, as some of the states of Germany could testify. And yet, such a wealthy and free state as England, has, until recently, been neglectful in this respect. I know not how to account for this, except on the hypothesis that legislation being shaped for the upper classes, the interests of the lower were overlooked; there was a conservative spirit which opposed the true sentiments of humanity and so far undermined the foundations of national greatness.

The education of the people in democratic governments, and indeed all the lower education of modern times, is wanting on the moral side, just where a popular government needs support the most. One reason of this has been that education fell into the hands of religion, and religion was faithless to its trust, or rather had a false view of what education meant. It was, to a great extent, the opinion of the Romish church, that knowledge hurt the faith of the lower classes, that ignorance was the mother of devotion. The religion that was inculcated was the religion of catechisms, and of formulas of faith, not the deep pure religion of the New Testament where morals and faith are inseparably combined, and from which spring the highest conceptions of character. The part of this work, which ancient legislators assigned to states having thus fallen into the hands of religious teachers, there is great danger of an unhappy division of it, now that states are feeling it again to be their office to train or provide training for the young. On the one side secular instruction stands by itself, on the other, religious. Education, thus, is in danger of becoming too exclusively intellectual, so far as it is directed by the state. The harmony and rhythm of soul, the sense of order, subordination and beauty, which some of the ancient states strove to cultivate—where are these professedly made a part of public education? Where are the public virtues and the duties

toward the state cultivated in state schools as they should be? This fault of modern education is greatest in democracies. Even the democracy of Athens, that humane public-spirited state, had no public education for the poor, except what they got from the public exhibitions of intellect and taste, which were not originally a part of a system of education, but aimed rather to give pleasure to a highly-gifted people. The moral sentiments akin to rhythm, order and composure, were not directly cultivated. How much more in modern times is this neglect visible. And where, by means of collections in art accessible to all, and of music, the people are cultivated in their tastes, as is the case in some parts of Europe, the satisfaction of the eye and ear are aimed at more than the rhythm and elevation of the soul.

The reason why this higher æsthetic education seems to be less at home in democracies than in some other polities, lies perhaps in the individualism there prevailing, which is opposed to order and harmony. The man who is surrounded by a kind of fence of rights, who, as a member of the body politic, is under constant excitement, who is expected to pursue his own way with all his energy, is not the man to be subdued and calmed by æsthetic appeals to his sentiments. Hence the greater need to him of a moral and religious discipline appealing to the quieter departments of his soul.

5. The control of general opinion has nowhere a greater sway than in democracies. Where society is stratified, there is no opinion that circulates through the society, and in the lower strata of such polities opinion will be local, until the means of communication enable artisans and laborers to learn the news and travel, and to give and take opinions touching their own art and the state. In the higher strata of society, a sense of personal importance, if nothing better, qualifies individuals to defy the opinion of their class, and thus a certain freedom of action is mutually conceded by the admiration which is felt for moral courage. In democracies there is not the same amount of moral courage, because the weight of opinion over against the individual is there greater. And as there are

no distinct separating lines between classes, fashions, manners and usages travel about with the utmost ease through all the portions of society. A peasant in Normandy retains the costume of two centuries ago, perhaps, while the newest fashions from Paris for female dress reach the chamber-maids in San Francisco in a few weeks. In more important departments of life, public opinion is almost tyrannical in democracies. New usages, new habits are adopted, not on conviction, but because others have received them. It is true that parties, sects, sections, have their own especial opinions which are not shared in by others; but within the enclosures the opinion is often tyrannical. This is one of the great defects in democracies, that men are so accustomed to move in masses, that the control of parties over their members is more intense than elsewhere; but with the spread of high and true refinement this evil may be somewhat abated.

6. There is in politics, according to the width of their liberty, an increasing degree of kindness between the classes and members of a community. Pride produces isolation; a consciousness of belonging to another class separates men; and these feelings will prevent kindly intercourse, unless the interval is so great (as between a freeman and a slave, for instance), that men will understand their positions and take their differences as a matter of course. Where there are *ranks* of freemen having a feeling of political equality, men are most jealous and most kept apart. The spirit of a democracy is such as to reduce differences of claims to their lowest point, and thus to allow the spread of some sort of fellowship through the whole of society. I grant that competition being strongest in a democracy will make men feel that others are in their way, and also that a feeling of equality makes some men ready to invade the individual feelings of others; but after all, the obstacles in the way of kindness seem to be less than can be found in other politics. It can be quite consistent with this that persons who are not secure of their position, who have perhaps raised themselves from a condition of which they are ashamed, should keep aloof from their

former equals, as if reminded by them of the past. But the general spirit is quite unlike this.

7. The love of show, of making an outward display with one's wealth, is more a characteristic of democracy than of other polities. Equality makes the attainment of distinctions possible for all, and the love of superiority always exists. Where a man or a family is conscious of a high position, there is no great motive to make outward demonstrations of opulence, and where ranks exist, the lower classes either have it not in their power, or would laugh at their own set for making a display. In a democracy the show of wealth by house, style, equipage, is a kind of coat of arms—a man thinks to climb into a superior station by it; it is not the pleasure of the comforts, but the pleasure of the show, and above all, of the feeling that he is equal to others. It is remarkable how the humbler class of emigrant women in this country will be smitten by the desire to appear in the streets on a level in dress with the wealthier of their sex. So also, gains which are saved in order to found a family, in communities where ranks and titles exist, are spent extravagantly where there are no such distinctions, and there is a reckless want of thrift introduced into society which often sinks such families after the second generation. Frugality is considered meanness, expensiveness is gentility. A cause, concurrent with the polity, may be found in the ease with which fortunes are made in a new country like ours; but to this cause alone this unfortunate state of things cannot be ascribed.

8. Patriotism and public spirit are virtues which all free institutions foster, but those most, where the individual most closely identifies himself with the country or the state and where permanent divisions into ranks or orders do not prevent the public feeling from reaching the widest circle of the community. Where the desire to found a family is strong, as in aristocratic republics, or where, as in feudal societies, there is no great idea of a nation before the mind of the individual, something of the edge will be taken off from patriotism. It may be said that in small communities, where the



individual has more of relative importance to the public than elsewhere, patriotism will be most intense ; but the conception of one great country, with one language, under one law, with one set of institutions, makes amends for this. The interests to be protected under modern governments are so vast and so precious, that the feeling acquires a great support from this source also. The old watchword, *pro aris et focis*, receives new energy in Christian lands, where multitudes cling with a love unknown of old to the family and the church, and where many other unions add value to the thought of country.

As for public spirit, we may say, I think, that it varies somewhat with the ease or difficulty of acquiring fortunes. Thus, in a new country, where the profits of capital are great, a man will readily relinquish a portion of what he has earned for public enterprises ; and to this should be added that public spirit suggests a way of distinguishing one's self, where all are otherwise equal. The amazing sums of money that have been consecrated to public objects, educational, charitable, and religious, in the United States, may be assigned in part to this motive ; but the benevolent and religious spirit exerts the greatest power.

9. The tendency towards multiplying associations for various purposes increases with the increase of freedom. Of course, where the government fears the people, it will put a curb on political clubs, and there will be a general slowness in undertaking great works requiring joint action and joint outlay. You might account for this movement towards common enterprises by the vast capital accumulated in the world—above all, in old commercial countries such as England and Holland, as well as by the protection offered to capital in the laws of all Christian states ; but in countries where capital is small and where there are openings for investment on every side, the same spirit of association is manifest.

10. The restless spirit engendered by perfect liberty of movement, and the hope of bettering one's condition, leads to change of place, to colonial enterprises, to the improvement

of the means of locomotion on the land and on the sea. The Greeks, with the Phœnician colonies, the Italian republics, England, the United States, are examples of enterprise enlarging its own area and invading remote regions with unwearied energy. In this roving spirit, to some extent, the family ties which confine a man to the neighborhood of his kindred lose their power. Yet the multitude of these settlers in distant quarters are binding a nation together, and we see in this country how the feeling of relationship is a tie between the east and the west.

The opposite of most of what has been said will apply to despotic states in the ratio of their despotic spirit. The government is afraid of the people, and the people of the government. Men are in a great degree devoid of enterprise. The country people live in ignorance of remote parts of the country and of remote regions. More courage, therefore, and energy are needed in despotisms by the people to go abroad for purposes of business, to found colonies, to undertake public works, than would be called for under other polities, since the unknown and the distant are objects of fear. Associations are discouraged by such governments lest they should lead on to dangerous political combinations. Public spirit and patriotism have no room to exist. Ranks are more fixed; the peasant stays on the land for many generations. It would be regarded by the most enterprising in such a motionless condition too great a risk to leave their original homes and employments. Between the classes of society there is a great gulf fixed; movements to overcome the barriers of birth are frowned upon by the state, and aided by no political habits. A general opinion, except on religious subjects, pervading all classes, is unknown. The encouragements to educate a family are few, and education must be directed by the government. The poor are unable to acquire learning or to rise into professional life. It would seem, then, that in despotisms, quiet, order, a stolid contentment, a certain reverence for supreme power without love or confidence, must pervade a community, unless the upper ranks and the mercan-

tile classes be excepted. Despotisms may have their day of transition into freedom when other nations shall have worn themselves out, but they must be receivers of what political good other forms of government have laid up for future ages, and they are now in their childhood.

11. The laws in despotic and in free states will be conformed to the spirit of the polities themselves. In this field, in which Montesquieu was an early explorer, we must content ourselves with an observation or two on the political laws of these opposite polities, or such as have a close connection with the constitutions. These laws will, it is plain, be intended to secure the polities. The instinct of self-preservation in a despotism will be expressed in preventing and repressing all movements which would be alarming to the government or to the existing dynasty, even if no suspicion is felt of the temper of the people. Lines will be drawn, if a necessity is found for them, around every exercise of freedom in the callings of life ; and a rigorous system of police will, as we have noticed in the little tyrannies of Greece in the Roman empire and in modern empires, have inspection over all deviations from a certain fixed line which may excite suspicion. It is easy to see, and we have already noticed, what rights of civil life will be most obnoxious to the spirit of the government, and how much fear will be felt towards the few political rights that are conceded to the people.

Yet even in despotisms there are breakwaters from old institutions or from religions older, perhaps, than the despotism itself; and there are changes from social causes which it cannot escape, and probably cannot foresee. When these changes begin to be discovered, fear may be awakened on the ruler's part towards the nation; and then the proper conflict caused by apprehension "of change perplexing tyrants," will become perceptible.\* Law and administration will be conformed to these new fears. In this conflict the worst side

\* Comp. what Dion Cass. makes Agrippa say to Augustus, lii., § 9: "Those who now live under tyrannies are always in slavery and always are plotting against their rulers."

of tyrannies will be manifested in its attempts at self-preservation.

Of the laws in free communities, where the government does not fear the people, little need be said. As the people either control or essentially check the government, there is no fear, no diversity of interests, no perpetual opposition expressed by the laws. The dangers here are a want of vigor in executing the laws, and a want of steadiness and uniformity in policy.

### § 269.

It may be questioned whether there is any invariable tendency in the nature of a polity to encourage inventions and the fine arts. As for the practical arts and inventive genius, we may affirm that they find their best field under free institutions. For, with the increase of the freedom of intellectual movement, the consciousness of strength and the power to overcome obstacles are increased, and hope of success is stimulated by the practical knowledge laid up within the community and accessible to all. The history of inventions seems to verify this remark. Many of them and minor improvements in them have proceeded from men without education, who have thoughts which they strive to realize, and who train themselves upward by correcting their errors. This they can do where free institutions cultivate enterprise and place the means of improvement within the reach of the laboring classes. The spinning-jenny, for instance; and in this country the cotton-gin, invented by a young man without experience, just out of college; the vulcanizing of India rubber; many improvements in printing-presses; some of the application of steam as a motive power, show what the comparatively untrained can do in countries where hope and energy are stimulated, and the means of knowledge are within the reach of all.

With regard to collections in science and the arts, the case is somewhat different. The most despotic governments can offer places and support to men of special gifts; they can found libraries and museums at their capitals, and outbid

Relation of different polities to the useful and fine arts.



others in purchasing the rarest manuscripts ; can educate artists, and establish schools of art ; can send explorers into all parts of the world ; can have expensive books on science or art printed, which states dependent on tax-payers would hardly venture to publish. All this they can do as easily as constitutional monarchies, and with advantages superior to those of most republics.

The fine arts stand on other ground. Nations have special endowments, for which we can no more account than for the other qualities of races. Hence, the freest race or nation may be incapable of excelling in the fine arts, and the most despotic may have a turn for music, or architecture, or painting. The English race, including the Anglo-American, is as yet not highly gifted in this particular ; although the latter, from the mixture of nationalities in its composition, may reveal hereafter an infusion of artistic genius. But where capacities and native tastes are equal, the free must surpass the despotic societies ; for the awakening of the mind will be greater, and the opportunities within the reach of rising talent, greater. Competition will be aroused by the success of the earlier adventurers, and the nation will learn to value the arts in which they have been successful.\*

#### § 270.

All the learned professions need training-schools, where the Relations of a  
polity towards the  
learned professions. beginner can be taught to think for himself, under masters who are left free by the government to propagate their opinions. We may regard it as certain, then, that a free government, if it establishes professional schools of its own, will leave the public teachers to themselves so far as the vital interests of the state do not oppose such freedom. The state will also cherish all the interests of science and learning, and will give an adequate support to the

\* As far as history proves anything touching the capacities of different states, it places despotic and even aristocratic ones below free governments ; Sparta and Rome, for instance, below Athens ; Venice and Milan below Florence. But so many causes have to be considered, that no general rule can be laid down, except that native talent and genius are most awakened under free institutions.

best masters. In a despotic state, learning and learned schools will not be felt by the government to be of the first importance. There will be a natural jealousy of all free thought on politics, history, law, and religion. Free teaching by men not appointed or paid by the state will instinctively be frowned upon. Young men will go forth from the learned schools into life with little enthusiasm and little hope.

Among the professions, law, in its applications to life, may be brought under despotical institutions into a finished science, yet its spirit can hardly fail to carry out the spirit of the government; but oratory will have no field to move in, and no stimulus. This is an exercise of legal talent which needs the forum, the jury, and the free assembly of legislators, all of which are inconsistent with despotism. The medical profession, for all that appears, could flourish nearly as well under a despotical as under a free polity; yet the *theory* can hardly be developed and perfected, where the individual physician feels a restraint from the members of his profession, backed by the instincts of the government; and the *practice* will not be pushed forward in a sluggishly conservative people. The clerical profession may be able in a despotism, as members of an authorized church, to prevent invasions of their ecclesiastical rights, but neither as men of learning, nor as preachers, will they be able to go beyond a certain circle. The state will keep them in leading-strings by paying them; if they belong to a hierachical establishment, the heads of it will be appointed by the rulers and be creatures of their will. No advance in theology or pulpit eloquence can be expected. Their chief function will be considered to be that of keeping the people in order.

Scientific men may form as important a class in a despotic as in a free government, both because they can be invited from abroad; and because the physical and mathematical sciences have no relations to the political and moral conditions of a nation, except so far as freedom sends its stimulating power into all employments and all classes.

That the literary class, poets, historians, writers on what-

ever concerns the public good, will wither under a despotism with all the readiness of a court to reward talent, it can hardly be doubted.

A class of writers which is increasing in importance, although of very modern origin, is that of journalists. As this class of writers represent through the press all the varieties of political thought which are floating in society, it might be supposed that they can only intensify the shades of political opinion. But this is by no means their whole work. Their main offices are to give the news and to comment on public affairs. A subordinate one, outside of the political sphere, is to keep men informed of the social and scientific progress of the world. The distribution of news is so important that a free, progressive civilization could hardly exist without it. In politics, if there were no such check as journals exercised on politicians by the speedy disclosure of their plans, the evils from this source would be far greater than they are now. They enable the constituent in a large country to watch his representative, and in some sort fill the same office which the citizen in the small state entrusted to the orators in the *ecclesia*. When a journal is committed to able hands, its services to the state will be almost on a par with those of the principal statesmen of a country.

In a country where journalists find encouragement, there must be parties with free room to act and free expression of opinion. The journal need not exactly represent a political party in all its doctrines and measures, but, as there are moderate men and intense men in every party, as there are those who go half-way with a party and those who favor all its measures, so there will be journals of every sort and suited for every class of readers. Journals do not make but rather follow parties, and bring them into their most advantageous condition for acting. Parties without journals will be far less intelligent than parties with journals.

But what do parties themselves do in a state, especially in a free state, where alone they can fairly act out their nature? This we propose to consider in the next chapter.

## CHAPTER XIV.

### POLITICAL PARTIES.

#### § 271.

In treating of political parties we shall not go beyond those movements of this kind in which thought and its expression are free, that is, beyond countries which are already self-governing, or where the seed is sown and is sprouting for self-government.\* In fact, parties, in the modern sense of the term, cannot be said to exist where there is no diffusive power of opinion, and when those who have common opinions on political subjects cannot carry their points by combined action.† In countries where knowledge and co-operation in public measures are very imperfect, there may be local dissatisfaction, strife between great men for places at court, and even wider movements, having their ori-

\* A work written by Prof. Wachsmuth, of Leipzig, entitled "Geschichte der Politischer Parteiungen," in 3 vols. (1853-1856), devoted to this subject of parties, begins almost with the creation of man. He devotes four pages to the United States, out of his nearly sixteen hundred. Cooke's Hist. of Party in England (1836, 3 vols.) is a valuable collection of facts.

† "Party," says Mr. Burke (Thoughts on the Cause of the present Discontents; Works. Bohn's ed., i., 375), "is a body of men united for promoting by their joint endeavors the national interest upon some particular principle in which they are all agreed. For my part, I find it impossible to conceive that any one believes in his own politics, or thinks them to be of any weight, who refuses to adopt the means of having them reduced to practice. It is the business of the speculative philosopher to mark the proper ends of government. It is the business of the politician, who is the philosopher in action, to find out proper means towards those ends, and to employ them with effect," etc.



gin in disputed successions or in religious contentions. But here a few leaders do all the active work ; the people follow their leaders without intelligence and independent judgment. Parties may be said to be divisible into two classes : *the first*, where there is no especial foundation for them in the nature of the government, and which are due to temporal causes ; *the second*, where the nature of the constitution of the state or the social condition is such, and the intelligence such, that differences of opinion are inevitable, owing to the difference of interests or of political doctrine in a country. Party may lead to civil strife and revolution, but is far from aiming at violence in its first formation. The violence is the result of opposition.

We may exclude from our consideration the court factions of despotic governments, and indeed all political movements of the people in despotic governments, which are nothing but local or temporary acts of resistance to oppression. Nor would we allow that parties can appear save in a very imperfect way in feudal kingdoms, where the combinations of restless nobles appeal to force without using or having a place where they can use argument. But as soon as estates were called and deputies represented the leading interest in assemblies, whether separately or together, there was room for free debate : both in the kingdom and in the barony the estates might combine together against the suzerain ; or form partial unions against one another. Nor could parties appear in a city democracy of a despotic type, for by the nature of such a polity it has overcome and overpowered all other classes in society except the people of the lower class. Here, then, if strife occurs, it will run into violence, it will be the attempt of one faction to overthrow another which at the time engrosses power. We may say further that there can be no such thing as party, where men of different minds are ready to resort to violence, if resisted ; and that party implies a certain sway of reason, an appeal to argument in order to gain a public end.

Mr. Wachsmuth speaks of the division of the kingdom of

David and Solomon after the death of the latter, as an instance of a conflict of party. We are unable to accept of his classification. The oppressive taxes of Solomon undoubtedly gave birth to this dismemberment. It was dictated by no desire to effect constitutional change in the kingdom, nor was argument used to delay the issue ; but as soon as the king's adverse answer to the petition or demand of the congregation was made known, the rebellion broke out. Possibly it would have been more acceptable to the northern tribes to have the political capital nearer to the centre of the land, as making the protection of all parts of the land more sure. But no such wish appears in the annals, and no demand is on record even of a council to control the sovereign. A word and a blow were all.

There was, however, in the later times of the Jewish monarchy, a party of some continuance and with distinct ideas, which they sought to carry by persuasion. The great question of the later monarchy was whether the Egyptian kings were strong enough to help the Jewish kingdom against the power of Assyria and of Babylon. The people, the kings, many of the princes, priests and prophets, clung to Egypt with a patriotic detestation, as they must have thought it, against the more terrible eastern powers. On the other hand, the prophet Jeremiah and some of the best men of the nation saw the hopelessness of the struggle with a kingdom possessed of such resources as Babylon, and while they were no friends to the new empire and were the truest patriots, they counselled submission. The result showed their wisdom.

But we will not delay in order to speak of governments and societies where parties are transient and not the necessary outgrowth of their constitutions. The operations of parties are best seen where the polity, if it do not require, at least encourages permanent divisions of opinion, and combinations to carry them out in peaceable ways, and where some diversity of interest necessarily gives rise to the desire to control the policy of the government. Such constitutions may not be as yet wholly free ;

Party dependent  
on constitutional ad-  
vance.

the supreme executive may be able to cripple the plans of those whom it opposes ; but still there is an amount of free opinion and a fearlessness in making it known that cannot wholly be repressed. Of the slow progress of parties in gaining their ends against the opposition of a court the history of England furnishes a fine example. For centuries the independent electors of England had not reached that degree of power that the court and its friends could not in a great degree counteract their measures. And yet the party opposed to free institutions was obliged from time to time to make concessions, until the middle class and a portion of the upper, the representatives of the liberties of the nation, felt themselves strong enough to oppose the king with arms. The death of Charles I. for a time threw the balance of power on the other side, until the vices of Charles II. and the follies of his brother rendered a revolution, which succeeded almost without bloodshed, necessary. This great event, with the improvements in administration, in the security of person, in the checks on the misuse of power, which belong to the same age, made it possible for parties representing the opinion of the educated and aristocratic class, however that might incline, to be predominant. There was a constitutional growth of elements forming the state, which conditioned the growth of parties ; but the movements of the elements on the side of freedom could not be said to have reached their requisite state of free action until after the revolution.

One phenomenon of parties that history reveals to us is that they vary greatly in regard to the number of leading principles, civil or religious or industrial, which enter into their profession of faith. In some of the ancient parties there was perhaps not more than one principle at issue, and that one self-defensive on the one or other side. In the little city aristocracies the question was how to cripple the democracies, so that numbers should not be too strong for old families and wealth. When the pope and emperor were at strife early in the thirteenth century, everything in the Italian towns turned on that contest.

Nobles and the class of capitalists and manufacturers were alike divided between the Guelphs and the Ghibellines. In many other cases a political faith has consisted of quite a number of articles. Thus the tory party at its origin not only supported the established church and the monarchy as of divine appointment, but gave to the monarch prerogatives which could not be resisted except by a passive refusal to obey commands which were thought to be contrary to the scriptures. The whigs, on the other hand, supported the state church—many of them, at least—on grounds of mere expediency; rejected the *jus divinum* of kings, defended the revolution of 1688 on the plea that the king had broken the original contract with the people, and in reality regarded the people as the only ultimate source of power.

Parties are sometimes broken up, and reorganized upon a single article of political faith, but it must be one of great importance, and which makes strong appeals to the feelings of multitudes. In modern times questions of humanity and of morals, which a whole people can understand, enlist minds of a fervid temper, and awaken in many an enthusiasm that breaks over all antecedent party ties. Such has been the movement for preventing the sale of spirituous liquors in several of the states of the American Union, which, however, after various legislative experiments, has done little besides dividing the better part of the community into two hostile factions, while the worse part was unaffected by the agitations. The abolition of slavery on moral and religious grounds took a far deeper hold of a more widespread and an almost national party. This party taught nothing which Quakers and other philanthropists had not insisted upon since the middle of the eighteenth century. But it had not entered into politics until the South, by opposition to it, forced men to look at it and to take sides. Then it was that the power of a single opinion drawn into the arena of party conflict became manifest. The Southern states, dreading the opinion which gave birth to the anti-slavery party, both because they half admitted its truth, and because slavery



was in opposition to the principles of equal freedom on which our institutions rest, preferred to run the risk of breaking up the union rather than to encounter this threatening foe within its pale, and in so doing nearly ruined themselves and the country.

Of all sentiments which, alone or in company with others, give life and heat to a party, the religious is the most powerful. In the United States, through the entire separation between the state and all churches, this cause of division is almost eliminated from our politics; yet even among us the cohesion and concerted action of the Roman Catholics make that church an object of jealousy to the Protestant denomination, and that the more readily because these move together without perfect union. Hence, from time to time its attitude and claims may become an element in our party contests. But where established churches exist, and more than one denomination is strong, religious differences can hardly be kept from entering into politics. The dissenters will be arrayed against the Church of England, because to that church the upper and more conservative parts of society belong; and because the principle of state support to religion is against the doctrines which are most cherished by the weaker denominations touching the province of government. The Catholic church of Ireland, owing to historical causes, will generally take an attitude of hostility against that English party which especially represents and defends the established church, nor will the disestablishment of the Irish Episcopal church put a complete end to this hostility. So in Germany, the dependence which state support involves, and the independence which is a radical principle of the Catholics, must produce conflicts as long as the state system and Catholic claims continue as they are. To produce political peace where more than one church is strong, either there must be entire separation between the civil and the ecclesiastical interests, or there must be servility of the church, and such a tyranny of the state as will bear hard upon one or another part of the system. And these grievances will have utterance through parties.

While thus in some cases a single principle or feeling unites parties together, in others a principle—and a very important one—may be held or rejected consistently with party allegiance. This is owing to local interests which clash with other local interests, or to political doctrines held in one part of a country and not in another, or to the interests of a class like the aristocracy of English land-owners, which could unite their strong forces on the two sides against a minister who sought to make the price of grain such as would be for the advantage of the whole country rather than of the land-owners. It is necessary for the stability of parties to have some such open questions, otherwise they will drive conscientious or wise men out of their ranks, and perhaps destroy their organization. There is no way of carrying on public affairs in safety without conceding to political men connected with the party in power a certain amount of independence. If the whip is used too freely, there will be a rebellion.

Almost always a body of independent men in a legislature, entertaining deep convictions of their own and courageous, will be the salt of the assembly, and will keep both parties within the bounds of right measures. But we cannot think that a third party, with strength enough to determine measures one way or the other by their votes, is fitted to do much service. If such a third party can carry any measure at will, it becomes a formidable power, and is liable to be tampered with and corrupted by negotiations with the others. Its members will become mere soldiers of fortune. Perhaps men will help to form such parties in the hope of getting the advantages arising from holding the balance of power.

It may be made a question of political morality to what extent and in what cases open questions ought to be allowed in party organization. In general, measures of vast importance, affecting the vital interests of the state at the moment, the passage of which cannot be postponed without prejudice to national interests, can by no

Open questions in party movements,

Third parties and independent members,

How far ought open questions to be allowed in a party.

means be made open questions. The head of a party who would permit such questions to be held or rejected within its lines, ought to sink into contempt, as a man who sought to keep in power by having as few principles as possible. The same contempt is justly bestowed on a party which will have no declaration of principles on the most important subjects, or only a declaration which can look both ways. More than once the parties in the United States have been afraid to take bold measures on questions vitally affecting the interests of the country.

There are, in every country where men think and talk freely on public measures, many who agree with neither of the dominant parties altogether. In some countries, many of the representatives in the legislatures, while agreeing in the main with one of the parties, cannot be relied upon for their uniform support. The English country gentlemen of a bygone age belonged, many of them, to this class of independent members of parliament. They seem to have had little acquaintance with law or constitution, and to have been led by watchwords, such as "church and king," but were not properly party men nor under the sway of corrupt motives. These are a most useful ingredient in an assembly where parties fight their battles, for they are a check on the audacity and the carelessness of party leaders. Very few such members are to be found in our congress, although they may appear in the state legislatures. The reason of this difference between the two countries is the greater intensity of party feeling here, with the more complete machinery of nominations. The difference is greatly in favor of England, where, in general, a more entire independence is allowed to the representative as one of a party than our practice concedes to him.

We have already had occasion to remark that some parties are determined by temporary causes, while  
Party doctrine and practice. others are to be explained by the very constitution of the country. Others, again, owe their source to events of the remote past, which have tended to mould the

character of the nation, but which cannot always continue to possess the same control. Parties in free states will naturally be modified by the three causes just named. The constitutional causes will make parties what they are; the events of the past will generally be looked upon with biasses derived from constitutional doctrine; but isolated causes will act so as to produce a certain inconsistency with the general spirit, the traditions of party. A most remarkable instance of this inconsistency was the purchase of Louisiana from France under Mr. Jefferson's administration in 1803. There was nothing in the constitution which contemplated any such thing as the purchase of territory, and yet the party of strict constructionists advocated this measure, while the president, himself, the strictest of constructionists, contented himself with expressing the hope that the purchase might be sanctioned by a subsequent change in the constitution. This was never done, and the precedent thus set has been followed more than once.

Parties that depend on differences of constitutional doctrine, or on some lasting cause, may be very Duration of parties. long-lived, yet the name will often last while the principles are forgotten. Or, if the principles retain their vigor on the whole, there will be a progress of parties; one will seize on some great political principle in advance of the other, and will carry it out in spite of opposition, so as to incorporate it into the lasting policy of the country. This is the case particularly in constitutions like that of England, which grow from age to age; while our written constitution, being fixed and interpreted by the supreme court of the land, is far less capable of taking such a step forward. We should have to make an amendment suited to the new exigence, like the amendments passed since the war. But in England, the acts of the convention parliament at the revolution of 1688 would not need to be repeated at a similar crisis, nor would the Tory party enter as reluctantly into similar measures now or hereafter. It is safe to lay down the general principle that old parties can never, in a progressive country, be exactly



what they were once. Every important measure has a tendency to show what the constitution is, and what it ought to be in order to carry a nation safely through unforeseen trials.

The names of parties, often in themselves unmeaning, stick to them because it is convenient to have a brief expression for a number of characteristic qualities. In our constitutional history the federalists were the party which was most active in forming the constitution and in making the union a veritable state ; with this practical aim it combined a certain attachment to England and English precedents, and was averse to universal suffrage and to political abstractions. It was the party of Washington and many others of the first men of our best age ; but, after furnishing the two first presidents, it gave way to the democratic party, and expired, as a party, at the end of the war with England, in 1815. The democrats were the party of states' rights, of political abstractions, of universal suffrage except for negroes; and, in the commotions of the earlier years of the century, it was hostile to England and sympathized with France. But while its name has remained, its doctrines have been considerably altered, nor do the names which have been applied to the antagonist parties (whigs, republicans) represent in any exact sense the successors of the old federalists. Of the somewhat progressive sense of the names whigs and tories, we have spoken already. Guelphs and Ghibellines continued to be names of political factions in the towns of northern and middle Italy, until long after the German emperors had ceased to be formidable either to the town liberties or to the pope's unrestricted action. These factions were kept in being by the quarrels of the different republics with one another, and by the traditions of the noble families carrying down family feuds from age to age. And when, after a long sleep, actual controversy between the emperors and the popes began again in the fifteenth and sixteenth centuries, the old parties had new life put into them, whether with the same or with new names, but without the old motives. (Comp. Ranke, *Hist. of the popes*, B. iii., § 1.)

Sometimes the history of party shows us several parties within one another, or side by side, crossing each the other's track, and in great confusion making separate issues. This is owing to the fact that real abuses, as they seem to one party, affect the interests or the traditional feelings of a portion of its members, so that some cannot go as far as others, and either withdraw or become neutral. An illustration is furnished by the history of the English civil wars in the time of Charles I. As Guizot remarks, the reformation of civil abuses was an end to a portion of the Puritans, and that of the religious abuses to another portion, both of whom were conscientious and acted on firm conviction. But if the civil abuses had been righted and security given for the future, many of the political Puritans would have accepted a church of England somewhat reformed and curtailed in the episcopal power. But there arose in this seething time multitudes of religionists who wished to base the state upon their several platforms, and behind all was the third party of the Scots. The presence of religious questions prevented compromise on any other scheme than that of perfect freedom, which, in the existing state of things and of opinions, was impossible. Accordingly, numbers of the old leaders retire or change their policy, until something very un-English comes to pass,—the ablest general becomes the head of the nation. The Puritans of 1640 were not the Puritans of 1649.

Most like to England in the relations of parties, as well as in the tendency to the practical in politics, was Rome. Here the questions were confined within narrower limits, but there was a progress forward, one party taking the lead of the other in this respect ; and when a point was once settled, there was no going backward except in Sulla's temporary reaction. The optimates of Cicero's time, in their view of the constitution and of the measures to be opposed or accepted, differed from the patricians of the time soon after the expulsion of the kings, more than the Tories under Charles I. differ from the Tories now.

In recent times, when various interests make themselves felt through their representative men, and new <sup>Parties within parties</sup> classes of society are gaining new political power, parties have become more difficult to manage and to satisfy. Especially is this true with the sections of a liberal party, which have views beyond one another, while a conservative party can act together in opposing all innovations, such as greater extensions of suffrage, or changes in the relations between state and church. In these states of parties there is great perplexity in respect to the course to be taken, and the old question comes up, how far men allied in parties may go in their compromises and concessions. These questions of statesmanship and of morals, as was said, belong to the positive or progressive rather than to the negative or conservative side. Many leaders of parties will go far beyond their own conviction of what is best, in order to ingratiate their extreme followers. But all such concessions are questionable and dangerous. They are so because, if the leader has no real conviction that they are right, many of his followers will have the same want of conviction, and the party, become weak, while the extremists, who have a theory to support, will clamor, even if their measures are carried, for something yet more undesirable. And, on the other hand, the most conservative of his party will leave him, as having left them and the party principles; so that he may be tolerably sure of handing over the reins of power to the other side at an early day. There must then come another organization of parties, the one being formed out of the old conservatives and their new friends, the other out of the more extreme progressives and others whom they can rally around their standard. Such changes, or changes something like them, have taken place under the British constitution, but under our written constitution and with the fixed continuance of elected magistrates in office are less likely to exist.

From this illustration we may advance to the result that, in many constitutional monarchies with responsible ministers, there must be such checkered compositions of parties as we

have described, which will often render the choice of measures very difficult. Some of this difficulty will be removed by outside gatherings of members, in which will be ascertained how far the majority for a particular measure can be calculated upon. Independent members also will be sounded. In such cases there is great temptation to strike bargains, not in the most barefaced way, but still in a way not honorable for the parties.

Every party has its principles, which, if it be honest, it means to carry, and the leaders, if there be What are and what are not party questions. such in fact, will redeem their pledges to the public, or incur the repute of dishonor. In our country such pledges, put together like so many planks in what is called a *platform*, are very often neglected. The reason of this is that no man of leading character is responsible for them. There are in other countries, where party government prevails, questions on which differences are so great that there is no hope of carrying them within the party organism. We have already, while speaking of open questions, said that none ought to be such which vitally affect the character or prosperity of a country. Now, the leaders or the followers may seek to carry such questions, not yet inscribed on the registers of a party, by all means in their power that are honorable, with the help or against the opposition of the other party. Such questions will relate to matters that have not been drawn into politics, like most that touch on improvements in the administration of law and justice, and the welfare of the nation in its various interests. But others are party questions, where it is expected that the party will be united, and in defence of which the ministerial leaders will stake their political existence. The practice, at such times, in Great Britain is reduced to a system. The ministry resigns, and either a new ministry acts with the same parliament, or a new parliament is chosen to determine what party shall furnish the ministers. In other constitutional governments the changes are not yet, it is believed, so summary or absolute. In our country no such thing can take place, because the president stays through



his time, the cabinet are permanent officers of the president, and the legislature changes at certain stated times and in certain ways.

Parties in a free country are exceedingly affected by the leading events of the time. Thus, the sentiment of Influence of historical events on parties. England was drawn towards the ancient constitution by the events of the civil war and the destruction of the monarchy; so that at the restoration the monarchy was more firmly secured in the heart of the people than it had been for many years. The long parliament of Charles II., when it opened its sessions in 1660, went beyond the court in its persecuting ordinances, and in bitterness towards those out of whose hands the power had passed: when it was dissolved in 1678, change of opinion and change of members by death or other causes, together with the disclosures of the vileness of the court and the king, made it essentially a different body. The lines between whigs and tories were now drawn, and the former accepted rules of constitutional government which had been the abhorrence of the high-church party seventeen years before. By the change in the line of succession the whigs acquired additional influence, while the tories were ready, it was thought, to welcome, or at least accept the family of James II. if they should succeed in getting possession of the throne. It was not strange that the defenders of the Protestant succession—those who had brought over and upheld the house of Hanover—should carry on the government, for many of the tories were believed to be Jacobites at heart. The whigs continued in power during the reign of the two first Georges, and gave place to a tory faction at the accession of George III., after England by their ability in administration had taken the first place in European affairs, and acquired an immense empire in the east as well as in the west. The fortunes of the parties fluctuated after George III. came to the throne; but when the French revolution alarmed England, the tories came to a secure possession of the government during forty years; when the demand for a reformed parliament called in the other party again, which has had control

over the country the greater part of the time since 1832. Yet as old issues are passing away, new opinions find lodgment in both parties, so that the moderate men of each agree pretty well together except on one or two questions.

The peculiarity of English parties is that a man, selected in form by the sovereign, and in reality by public opinion within a party, has for the time the government of the country in his hands. In democracies, where the offices are filled by elections, a party carrying the elections has the government until a new election takes place. In those extreme democracies where in great measure the lot assigned office, the parties exercised their power by means of popular orators, by attacks on public men before the courts, at one time by ostracism, and to some extent by political clubs. At Rome there was long and earnest strife between the parties which arose after the fall of the kings, until at length every office was opened to the citizens, irrespective of birth. After this the tendency appears towards oligarchy and ochlocracy; and the personal element, the sway of a single man over multitudes, is on the increase. The later years of the republic read us a satire on parties. The lower class of citizens have lost their independence of character. A struggle for power between two great leaders points towards an imperial *tyrannis*. The elections are carried on with the most shameful bribery. The active partisans consist of the chief and his friends, some of whom must manage the lower classes, others, the senate if possible, others, command the armies. But there are two points of gravity which need to be especially watched—the senate and the people—the latter, mainly, as being subject to the influence of the tribunes. The old dualism of power shows itself in a somewhat new form, and is hastening Rome on to its ruin.

The danger of a democratic empire is the natural and great danger of a democracy. Disruption, or a kingly government, is by no means so great an evil. But, as we have said before, among us, the separate states, many of them now with old habits of self-government and with histories of their

own, will be a barrier—may they prove an effectual and lasting barrier—to such a consolidation.

Whenever a matter of immediate interest is to be gained by combination and discussion, the feelings Violence of parties. become intense, so that the most false, wide-sweeping remarks in disparagement of the opposite party are continually uttered. Political unions and important measures alone do not excite the feelings more than questions between religious parties excite them ; in both spheres trivial matters are enormously magnified. The violence of expression will be in proportion to the general tone of manners ; if that will not endure vituperation and anger, the violence of party will be under a restraint. In this excited state many things will be said and done which men, those most concerned in them, will regret afterwards.

But, after all, the violence is not so bad as the tone of character, the want of honor which admits cool-blooded misrepresentation and trickery among the means of injuring an adversary. The violence injures those most who make the most use of it, but the misrepresentations and tricks of parties corrupt a whole people, and if one side resorts to them the other will be tempted in self-defense to do the same.

Parties must have some sort of moral cement to bind them together, and they need this the more if they Allegiance to parties. allow base things to be done for the promotion of party interests. The worse the parties are and the more selfish, their one rule will more and more be to stick together. Allegiance is broken if a man deserts his party, and the abuse is so strong when individuals do this, that a vast amount of moral courage is needed to make the change. Only, when numbers go over together, they will keep each other in countenance. This principle, which puts partisanship in the room of patriotism and fear in that of conviction, only retards the death of a party that is mortally wounded already. But it debases character more than almost anything else. The fear of public opinion in a free country, where character and motives are discussed without reserve, is strong enough

to make cowards of most men ; but when it becomes a moral principle that a man, if a representative, owes it to his party to vote with it through thick and thin, and is bound, if only a private citizen, to support the regular candidate, there is a turning of moral rules upside down which may corrupt the character of a whole country.

### § 272.

In speaking of parties in the United States, I refer more particularly to parties formed on general questions relating to the administration of our national affairs. Parties in the United States. These, in fact, pervade the country, and make minor differences less important. There will often be combinations in states or sections to carry something of local interest, which may oppose for the time the general interests of parties. But such divisions cease when they have accomplished their purposes, while the parties running through the union are kept up even when there is no reason for their existence.

We have already seen that our parties were the result of our constitution and of the great difference of interests or way of thinking between the slaveholding and the free states. For a few years the federal union needed all energy and ability to support it, and during this time power was lodged in the upright federal party. Then it passed over to the democrats, whose sway continued nearly all of the next sixty years. Most of this time it was southern leaders who shaped the policy of the country, and it was these who, by resolving to secede in 1861, brought on the war. At the restoration of the union, the party which carried the war through to a successful issue, and which may be called a second federal party on account of some of the principles they were obliged to adopt for the defence of the country, was entrusted with public affairs and is at the helm while we write ; but, owing in part to difficulties which the war bequeathed to the country, in part to the essential evils attendant on party management, in part to the incapacity of the government, this party ere



long began to lose confidence, and to render some other combinations necessary. And here we are brought to the peculiarities of our party systems, their results on national character, and to the question whether remedies can be successfully applied for the cure of their too obvious evils.

The lines within which parties move in this country are somewhat narrow. To a great extent, questions of foreign relations lie outside of them. There is hardly a question of importance now touching external intercourse, on which the country would separate according to party divisions. Foreign wars are not looked upon as probable, unless with weak powers in our neighborhood, and these would be short, isolated occurrences.

Within the lines where party can move, it may be by our constitution unable at once to get possession of the administration. We have already said that the national parties, in great measure, control and direct those in the states. Hence, these national parties, when they have once elected the president of their choice, are tolerably sure of a very important control for at least four years. Even if a majority in both houses should be against the president, they could not have their own way in managing the government. His veto, his appointing power, his direction through his cabinet of all foreign affairs, of the treasury, of the post-office, the army and the navy, remain untouched. It is conceivable that a president, with the two houses—especially with the senate—against him, might encounter much factious opposition; that he might be obstructed in doing what was his unquestioned work; but the plot, if there were one, to *force* him into a compromise within his own sphere, would only recoil on its inventors.

The president, then, for his four years, is not only a power, but a *personal* power. There is no denying that a self-willed man in that place is intrenched by the constitution in a fortress that cannot at once be taken. This personal power is made up not so much of his having political opinions, as of the appointments to office which are under his control, immediately or directly. This power of appointment has presented

a problem as yet unsolved, the importance of which was never fully comprehended by the people or by the makers of the constitution. There was a degree of doubt at first whether the power to appoint involved the power to remove, and whether the President's undoubted power to fill up vacancies, that might happen during the recess of the senate, extended to such vacancies as were created by his own act of removing an officer after the adjournment of the senate. In the first congress Mr. Madison contended that the wanton removal of meritorious officers would subject the president to impeachment and removal from his own high trust. It was, however, generally admitted that the president could remove from office, and that his motives could not properly be subject to examination ; and so this exercise of power has remained with him until the present day. In regard to the other question, precedent has established that he may create a vacancy without alleging reasons. He and those who act under him can either appoint directly by law, or a confirmation is needed from the senate. This body will naturally confirm the cabinet officers, unless in extreme cases, on the ground that the chief magistrate ought not to be interfered with in the selection of his own especial advisers and servants.

As the president is thus made the dispenser of power and of office to a vast extent, his personal influence may be said to reach to all the states, counties, and towns through the whole land. As the sovereign is the fountain of honor in England, so the president is the fountain of office wherever there is a national office to be filled. But he is such within the party which elected him. It is, indeed, quite possible for him to disregard all party claims whatever, and to look after, or see that his subordinates 'look after, the fittest man ; but it has been found hitherto nearly impossible to carry out such a rule very far. Or he may stop short of this, and make it a rule to continue the present officials in their places (although they are of opposite politics) until they are proved to be inefficient or untrustworthy. But such would be the pressure upon him to swerve from either of these rules, such

would be the opposition from his own party in the senate, or from the cabinet, that few men could have the courage to hold out in a steady course of following their own convictions in circumstances like these. The senators—*τῶν οἱ νῦν βροτοί εἰσιν ἐπιχθόνιοι*—would refuse to confirm his appointments unless he confirmed theirs, and the question would be who would hold out longest. Thus the rules of political morality, never to remove a man who has done his part well from the humbler offices of the government, and never to nominate without proof of proper qualifications, which would prevent a world of corruption, are practically impossible, because the politicians who fill important places in congress will form a kind of junto to aid each other and the friends of each other. And, although the president has great official power, he has little resisting power. They can trouble him far more than he can trouble them. Unless made of angelic stuff or of iron, he must yield. The multitude who have an interest in corrupt politics are stronger than the one.

The progress of party tactics is illustrated especially by two facts. The first is that, when the democratic party came into power with the election of Mr. Jefferson, the removals were few—so few that single cases excited a sense of wrong through a whole state. When Jackson followed John Quincy Adams in 1829, they were far more numerous, although the political change was little else than the displacement of one wing of a party by another. Since then no party has thought of protesting against removals on mere party grounds, and against putting in the “friends” of the successful candidate. The other fact is that a civil service bill was projected a few years ago, in order to put an end to the worst of the effects of the present custom. The president professed to view it with favor. There was to be an examination of persons proposed for offices of inferior grades, and the successful candidates were to be the seminary for higher offices; or, at all events, some check was to be put on the selection of candidates. But senators opposed the plan, some cabinet officers refused to have it apply within their bureaus, and at length it fell to

nothing ; the man who had consented to endeavor to make it successful gave up the work in discouragement and mortification.\*

If what we have said is true respecting the distribution of offices in reward for political services, or in the hope of securing political supporters, it is plain that such a system must require an organization of the whole country that it may be successful. The extent to which such organization has gone, and the means which have been adopted, are even startling. The clerks in the departments in Washington have been called on for contributions to defray the expenses of "campaigns," as they are called, and have in some instances been sent home to their respective states to vote. The local officers of the general government have managed state elections, and have mingled officiously in local politics. Meetings through the states, on the greater or on the smaller scale, are called and led by men of whom nobody knows anything which inspires confidence, whose only gift is by means of underlings to get at the ear of the lower stratum of the people. These men a party cannot afford to trifle with, for if they render no service or become enemies of their party, it runs a risk of losing the election.

In state affairs, party is not generally so carefully watched and managed as in national affairs, since the prizes are not so great. It often happens that local questions separate fractions of a party from the main body for a time, if not permanently. But the same principle of reward for party services is acted upon throughout, and it is impossible to disconnect state and national politics for any length of time.

The management of parties by means of subordinate leaders appears in the way in which the voters belonging to foreign nationalities are made to act together. In a country of equal rights it seems most unreasonable that foreign emi-

\* While we are revising these pages, a new plan of civil service has come in with a new administration, which, if the politicians are not too strong for the heads of the government, will be an immense blessing [March, 1877], from 1st ed.



grants should not be assimilated in a short time to the native population. Why should a German or an Irishman retain his nationality to such an extent as to claim a right, not as an American citizen, but as a person born in a particular foreign country, to have office on different terms from citizens of native birth. Why, in other words, should any one claim a right of partaking in office not merely as a citizen, but for the additional reason that he was not by birth entitled to office. The thing is preposterous. But then there is a certain tie binding these citizens and their children—it may be their remoter posterity, together ; and this tie of former nationality, with the additional tie of a special religion in one case, renders it possible (nay, renders it easy) to unite together these classes of citizens. They can thus be managed as bodies, and demagogues, seeing how great facilities are thus furnished for their game, contrive to act as agents of politicians in securing large masses of voters for their principals, and in establishing claims of their own on the victorious leaders. The same operation must go on where masses of colored people are exposed to the influence of crafty men of their own color. Where voters are unable to cast an intelligent vote there will be more or less of such political craft, and demagogues of all demagogues least to be trusted.

A very important point in any political system, and one deeply affecting the character of a self-governing people, is the means taken to bring the names of persons thought of for office before the constituencies. In a part of the country it has long been felt to be an impropriety for a man to offer himself as a candidate for public honors, as if such a public expression of his desire were inconsistent with equality and with modesty. And yet even where this opinion is held, the immediate friends of a man will sometimes put him forward against the party candidate on account of some rebuff that he has met with. The desire of punishing the party by at least drawing away votes from it now justifies what is all but self-nomination. But on the whole, in the northern and eastern parts of the country, nomination through the regular

party conventions, in the composition of which not one voter in a hundred has a share, and the members of which are scarcely known beyond the conventions themselves—such nomination is thought to be alone decorous, and it enables the voters to know whom to vote for. This saving of trouble, this assistance given to people in discharging their political duties with the least expense of time, is probably the main cause why the caucus system of nomination for office by agents of a party has found favor and struck root everywhere. In the olden time, during our colonial existence, and a little after, there was no difficulty in making selections, on the principle that a tried public man ought not to be laid aside. But when frequent changes took the place of this conservatism, there was need to know whom to elect; the people in the town meetings found it convenient to have some preparatory or nominating committee; and so there grew up more secret, deliberative, irresponsible bodies, where the electors could not well attend, or, if present, would discover that they were not wanted, or, if they took affairs into their own hands, would provoke the caucus leaders to hold meetings somewhere else. The necessity for the existence of such caucuses or conventions was further impressed on the active politicians by the importance of having an understanding between the different parts of the state, so that a party could be sure of a body of representatives who would carry out its measures. Thus the parties of the union weigh down on the states, the parties in the states weigh down on the towns, general concert is the word, and independence is all but extinguished.

All the country, however, has not been equally under the control of caucuses, as far as the selection of nominees for office is concerned. In the southern and southwestern states men proposed themselves and went "stumping," as it was called (that is, speaking from stumps of hewn trees), through their districts. The opposite candidates travelled together, attacked each other's positions, answered hard questions, and in the course of the meeting gave the voters—many of whom could not read—an intelligible, if a partial, view of public

affairs. This attached a successful candidate to his district ; it was a cord that sometimes pulled against the party ropes ; he felt that he might be called to account at the next mass meeting for opinions expressed and promises given ; he had, in fact, placed over himself a body of watchmen and supervisors of a far better kind than a general party had to offer. Why should a system of self-nomination be disparaged, when it has had full career in two of the manliest nations of the world, Rome and England ? Has it led to bribery and trickeries at elections ? Not more than the other. Did it bring inferior men into public magistracies at Rome, into parliament in England ? Undoubtedly family connection and influence have brought inferior men into public life in both countries ; but where can we find men superior to those to whom the same method of self-nomination opened the way into long and illustrious service of their country ?

In estimating the quality and characteristics of our political life, we ought to consider that within seventy-five years universal suffrage has superseded property qualifications wherever they existed (and they were known to all the early colonies) ; and that immense numbers of uneducated foreigners have spread over all the northern states, while the enfranchisement of the colored people at the south has rendered the conferring of the suffrage on them a practical necessity. The writer of these lines was taught in his boyhood that a wide suffrage was a very serious evil, and the doctrine continued to be common long after democracy was triumphant in national affairs. James Kent and Martin Van Buren, of New York, the great civilian and the democratic president, united in expressing their apprehensions of it in a convention for revising the constitution of New York, in 1822. At present multitudes have the same faith, but regard it as hopeless to take steps backward, unless at some future day socialistic agitations should render restrictions on suffrage a measure of public safety ; and they put all their hopes for the future in a better education—perhaps compulsory on all, and in an intelligent population of farmers. Two states alone, we believe, make ability to

read a qualification for the exercise of the privileges of the voter.

The problems of a party kind are so mixed up with the social problems in the large towns that there is danger of unfair treatment of the former. Thus much, however, all will admit, that nowhere are party ties drawn tighter than in the cities, nowhere is the organization more complete, nowhere is there so close an approach to the arts and ways of the ancient demagogy, and nowhere is there worse management in regard to all general interests. The constituencies which elect embezzlers and speculators to office, such as we have all known of in late years, are incapable of judging of qualifications for office; it is the fault of those who take advantage of the system, and not their fault that bad men are chosen—any more than it is the fault of the horses when a drunken driver turns the carriage over into a ditch. And how this great evil, which, by exorbitant taxation, may ruin great cities, can be stopped, I do not see, except by legislation which will allow the tax-payers, and them only, to have a vote in the assessments. (Comp. § 239.)

An evil, especially in the towns, growing out of the extent of suffrage, is the apathy of persons of intelligence and standing in regard to public affairs. Their minds are absorbed in business. Their profits are considerable, and they pay taxes without complaint, believing all the while that the system of municipal affairs is deplorably mismanaged. If this great disregard of political duties could be unlearned, and if municipal affairs could be kept apart from state and national politics, there would be good hope that this slough of despond could be drained off.

But suppose all the better part of society, those who have intelligence and those who have character, to be faithful in discharging their political duties—suppose them to be neither discouraged nor overawed, how are they to act in the purification of parties? Can they do good by forming a new or third party, intended to serve as a check on the two others? If successful, this would draw to it bad materials from the



existing parties, and would soon become corrupt itself. Can they accomplish their work by entering into the other parties, according to their political convictions, and insisting on having a share in all those primary arrangements for office, caucuses, conventions, and the like, of which they complain so much now? The probability is that they would be met and worsted by new intrigues, without gaining anything for the cause of political honesty. I see no way in which they could act so well as by acting within the existing parties, and yet determining, each individual for himself, to cast their votes for no one who is a political intriguer or untrustworthy man. They act in this case without any forced combination, by the power of a vote which is silent, but well understood. Suppose this to begin in one of the parties, and that this party loses the election on account of such independent action. Can the party fail thenceforth to make a selection of better men? and if this is to be its principle, will not the other be compelled to be more careful in choosing its candidates? If thus there is understood to be a quiet body in both parties which will rebuke all improper selections for office, this one thing will go far towards creating a moral revolution in state and in country. Staying away from the polls on account of the badness of parties is an unworthy course; but going there and rebuking your party for its improper candidates is something honorable for every good citizen to do.

In regard to the nomination of candidates for office, I should be glad to see the plan of offering one's self to one's fellow-citizens tried on such scale and for such a length of time as to take away all novelty and destroy old prejudice. This, in the case of inferior officers chosen by the people, would not call for speeches of candidates; but, when important elections were made, it would compel the voters to become more familiar with the great questions that divide parties than they are now; and candidates might with advantage be called before the voters to advocate their respective opinions.

## CHAPTER XV.

### POLITICAL CHANGES.

#### § 273.

A STATE that is not built on caste or shut up within itself by non-intercourse with the rest of the world, Causes of political changes. cannot escape the changes that affect the condition of society, and through them the state of opinion and the other causes on which political systems themselves depend for their stability. Even China has not been able to avoid changes produced from abroad (those resulting from the conquest by the Mongols), and from within, which have shown themselves in various revolutions. Nor has India, with a system most wonderfully devised for permanence, been able to resist foreign influences which now, at length, seem to be undermining the old institutions of Brahminism ; nor were these institutions able, more than two thousand years ago, to suppress without a struggle the reformatory movements of Buddhism, which at one time seemed about to control the whole peninsula. It was the greatness of the change, apparently, the danger of the abolition of caste and of the fall of Brahminism, that roused the leaders of society to a struggle which slow and silent changes would not have provoked.

Changes may be silent and unperceived in their action on society and on thinking, or they may be open and manifest. Thus, they may be of such a kind as not to be provided against, or they may give notice of their approach by what they had done in some other country. They may appear in such a shape that all, even the most conservative, the most uncompromising, will welcome them, and in the end they may turn out to be the most sweeping and revolutionary of

all causes. They may be entirely beyond the reach of prevention by any causes, material or spiritual—as much so as plagues and other distempers ; or there may be no prevention within reach as long as the existing organization of society continues. As Thomas of Sarzano became pope in 1447, under the name of Nicholas V., he saw no signs of evil to the church in the humanism to which he had long been devoted ; he encouraged Greek and Roman learning, and founded the Vatican library. Yet it is now clear that these new studies broke up the stagnation of thought; became rivals of theological learning and even threw it into the shade; spread a love for liberty and a spirit of free-thinking after the antique pattern among Italian scholars; and were one of the leading causes of the general revolution which became manifest in Europe in the middle of the fifteenth century.

The old political writers were familiar enough with political changes, and we shall ere long go back to Aristotle for some of his results as drawn from the history of the Greek cities, and brought into a philosophical form. But as they had small experience of the operation of spiritual causes on a large scale in changing opinion within the political sphere, the power of such causes they could not duly estimate. And although Plato was well aware of the necessity of religion in conserving political order, Aristotle has very little to say on this matter. In fact, I have seen no passage where he contemplates what the effect might be of such a general atheism and irreligion as that which soon followed his era. The power of judging with justice, concerning the vast influences of spiritual and social causes upon the forms and spirit of governments, was never within the reach of the human mind, until a general unity of thinking had been caused in the Christian world by Christianity, and until under its protection other agents in modern civilization had given each its contribution to modern times. The ease of spreading ideas all over the civilized world gives rapidity, energy, and distinctness, to every new turn of human thought.

Some political causes of change act directly on political

forms ; others act indirectly. We will consider the former, which are fewer in number, first, and then pass over to the others.

We mention first, *example*, as propagated from place to place. To this cause the Greek states, so many in so small an area, were extensively subject. We cannot account for the frequent tyrannies following one another in the age of the earlier *tyrannis*, nor for the democratic revolutions afterwards, by the existence of a common moving sentiment and a similar condition alone. The news of revolution, as it spread over Greece, added fuel to a fire all ready to burst out ; and so, on the other hand, the news of their unfortunate issue in particular cases may have damped the ardor of a city ready to change its polity. So, also, it is likely that the various city institutions of the middle ages did not begin without some knowledge of movements elsewhere, in the same direction. In modern times the example of England, its government securing liberty and order, created, in a sense, the " spirit of the laws," and preached constitutional government all over Europe. Nor has the revolution of 1776, in this country, been without a vast influence by way of example over Spanish America, in Switzerland, and in France.

Still more potent are new political and politico-moral principles. Few will deny that the modern doctrines of personal rights, and of a people's self-governing right, whether in their milder Anglican or more revolutionary French form, have had a vast influence in aiding all other concurrent causes, such as the feeling of being oppressed, discontent with the existing government, and the struggles of orders. And although in themselves they may be dead, being alone, yet when thus employed as allies, they may remove scruples from the consciences of many, and intensify the sense of wrong.

This doctrine of human rights and of human equality has reached its greatest height of power in defending and redeeming the colored race from slavery. Scarcely ever has an enslaved race been led to attempt its own liberation by the mere feeling of being held in unjust bondage ; nearly all the



movements having this in view have come from the sense of human rights acting on the humane or the fanatical freeman. We need only refer to the emancipation of the slaves in the British West Indies, with pecuniary compensation to their masters ; to the late war, which, but for the cry of "abolition," would never have broken out, and to the extinction of serfdom in Russia.

Another theory or doctrine, which is now uniting men all over the Christian world, is that of the socialists, which looks forward to a revolution in society greater than any that has been known since the foundation of the world, and would have, if it could be realized, greater effects for a time, than those to which it looks forward. We have already spoken of communism in its earlier form, and of the social theory (§§ 103, 104), and incidentally of the socialistic doctrine concerning property in the soil. We need only refer to its principles in regard to wages and to the position of the capitalist towards the manual laborer, to its doctrine of inheritance, and to that extensively held by its leaders concerning marriage, religion, and God, as indicating an opposition to the whole framework of existing society—an opposition as entire as that between materialism and atheism on the one hand, and God and providence on the other. There can be no terms between such a plan of society for the future and the existing one. But there is danger that the feeling condemning most of its doctrines may keep men from condemning whatever social evils have helped socialism forward. There is reason to believe that it derived its origin from abuses in the social system co-operating with an abstract and partly false theory of the rights of man. Neither cause could produce permanent results, but let not evil in society be defended by the argument that the socialists complain of it.

We turn next towards some of the causes which act indirectly on political forms, chiefly through opinion, and in part by raising up new powers in society which insist on having their rightful and proportionate influence. The first of these is religion, whether it appears in the shape of a new faith or

in that of the claims of a new church, or in that of the decay of religious belief and the spread of scepticism.

Every vigorous and earnest society contains a large number of persons who value their religious convictions above all other things, and are prepared to resist any change or intrusion of novel religious faith or worship. In states where there is no liberty of worship the new faith or church encounters great resistance, and this continues until opinion is prepared to yield toleration at least to the new opinions and the new worship. Generally the resistance will be made, in countries professing some form of Christian faith, by laws affecting the status of individuals according to their outward worship, as by test acts and subscriptions to religious formulas. When opinion so far yields that a real religious freedom is permitted, the state will have brought into the spirit of allegiance many who were wavering or disaffected before, and the sense of justice will no longer be violated by disqualifications of citizens on most unreasonable grounds. Or it may happen that a state passes over from one form of church order to another, holding all the while that an establishment of some sort is necessary. In this state of things the adherents of the old church, allying themselves with external enemies, may bring a state into extreme weakness or peril. When the equality of all religions before the law is admitted, there is then no room for change ; but religion, while it may have all its old sway over individuals, is a cause aside from national affairs in this sense, that it may leaven everything with its principles and ways of judgment, and yet act only through personal life and feeling.

The decay of religious faith is a cause that deeply affects national life. If it disappeared entirely, so that there was no recognition of providence or of the divine existence, we believe that the great bulwarks of civil morality and order would be destroyed. This is in fact true even of the decay of any heathen religion with nothing to supply its place. But, firmly believing that the principles of Christianity received into the soul cannot fail to bring it into harmony and

order, and that an opposite set of principles must bring into the soul disharmony, unrest, and commotion, we cannot avoid applying the rule which is true of the individual to the state : if no state can thrive by the play of the selfish interests and the kindly feelings of society only, then the undermining of faith must be the undermining of the state itself. But the decay of faith cannot be stayed by argument or by forms of religion ; it must meet and grapple with convictions more powerful than those negations on which it rests—society itself must be revived.

There is yet another prop afforded by religion to the state. It is the feeling of *unity* which we find in the ancient city-states, where protecting divinities bound the community together as faith in family gods cemented family unions, which in larger societies, as under Iranism, was the strongest fortress of national feeling ; which was the very life of the Jews, so that, to the pious Jew, Jehovah and the commonwealth were inseparable ; and which in many Christian lands has shown its great force in resisting enemies belonging to another religion. The entire separation of state and church does not destroy this feeling of unity altogether, for there are many who, although differing among themselves, look on Christian institutions in the general, as the groundwork of a true and the only true civilization ; and there are many more who within their own pale cling to this *uniting* principle, common to them and a multitude of others, as being vitally dependent for its prosperity on civil order and its chief support. The decay of faith causes all these props to tumble down.

But far more obvious, as a source of change, are the accumulations of capital by the use of industry in a country where personal property had before been small in amount. In almost all nations where labor is but little divided, the land will be owned for the most part in large parcels by a few persons, who form the upper class, the military or equestrian order, the legislators of the country. The land is cultivated by slaves or serfs, or by poor freemen. The wants of

the great landholders are met by manufactures carried on within their own domains by their retainers, or by imports which a small trade offers in exchange for various raw products of the soil. This kind of life might almost get the solidity of a system of castes, if an innovation could not begin from the growth of towns, for it may be laid down as a rule that no durable political change in a country yet undeveloped can begin from a landless rural population.\* Least of all could the peasants initiate a successful change in a feudal or semifeudal society, where a country itself had become disintegrated, and nearly all the central authority had passed over into the hands of the great landholders or barons. But what the laborers on the soil cannot do, in that they are incapable of combination and are destitute at once of skillful leaders and military experience, that the towns can do at some favorable crisis and epoch of their growth, unless the military class perceive that there must be in the end an essential opposition between their political interests and those of the dwellers in cities. It is for their direct advantage to have taxable subjects on their own soil, to find that a settlement of merchants and manufactures increases the worth of their lands and products, and that they are placed within easier reach of the luxuries of remote lands. They are content, therefore, to confer such privileges of local self-government and police, under an officer of their own, as will protect their rights and offer inducements to new-comers. From these beginnings towns may push forward into still greater independence ; they may form alliances with one another and with the suzerain ; may, for help afforded to their immediate sovereign, buy him out in regard to all important political rights ; until they are felt to be a body in the state which cannot be despised, by whose aid the suzerain can subdue the nobles, through the

\* I say "durable" with the jacquerie and peasant's revolt in mind, which broke out before their time, owing to the action of peculiar and even temporary causes, but died down quickly. The peasants' war in Germany, caused, it would seem, by wrongs of the fifteenth century and a new awakening of thought, ended unfortunately.



money and armed men of which he can gain the position of a real monarch over the barons who had long before usurped nearly all the royal rights of administration and jurisdiction.

It will be seen at once that the foregoing is a general outline of what took place in Europe during the mediæval times. The barons and great ecclesiastics, by privileges granted to infant towns, laid the foundation for a new force in society, and could not but do this, as it seemed to promise well for themselves. Thus political change by slow degrees inevitably crept in. The change, of course, would be resisted; but the towns, created by the acts of great proprietors, were well able to defend themselves, and for the better defence of their charters combined against the lord of the soil (the king, bishop, baron), or against the inferior nobility—some of whom, compelled by force, some of their own will, entered into the town organization, while holding lands without, and became a part of the body politic. The noblesse or patricians thus added strength to the towns, especially at first; while afterwards, it might happen, they turned out to be most uneasy members of civic communities, forming factions among themselves or arrayed against the untitled wealthy class of merchants and great manufacturers. (Comp. §§ 171, 187.)

These changes were all derived from the compactness of town life, from the acquisition of wealth, from the sense of power caused by the possession of it, and by the opinion of what was right and just; which, as the towns grew and spread, became almost a national opinion—one of the indications that the country was feeling its way towards unity, and that a wider association lay in the future. The opinion with which the towns acted on the kings and lords, was owing, not only to the importance which the towns themselves acquired in a material respect, but also to the gathering within their walls of men cultivated in legal science, of such as had travelled to remote lands and took wide views of things, of professors in universities and trained physicians, of men of noble extraction living on the produce of their lands, but fond of the social enjoyments of city life. Here, too, luxuries and

refinements grew up, which made the country nobles feel an inferiority to the citizen in spite of their pride.\* And here, finally, the various kinds of literary men gathered; books were copied, lectures beyond the demands of mere professional life were given, and a learned class arose, forming a sort of brotherhood through a country, or even over Europe. The changes from these sources might be slow, but the political condition could not be what it was before, and the third estate grew in consciousness of strength—at first within the towns, then as a general body, until from the towns came, first, a predominant opinion and a feeling of nationality, then the demand for alteration in government. In some countries they did not in the end gain very much; and there was no great sympathy in them for the peasantry, which long remained a dead and blind mass, unless other forces, those of religion and education, came in to raise them from their ignorance and serfdom. The greatest of all the political evils, that the peasant did not own the land which he tilled, remained a problem for the future to solve.

### § 274.

#### *Revolutions.*

The political changes which we have just considered have been slow, often unperceived, and incapable of being estimated, save by history looking far backward. There is another kind of changes arising, it may be, out of one or more of the same causes, aided by some great grievances of the present, which have been common enough under free institutions, and wherever a nation has reached an advanced point of activity in thinking and judging of its own affairs. These differ from the other changes in being explosive and in demanding immediate political alterations or reforms, by force if necessary. They differ among themselves in this, that there may be no concert, no conspiracy; but there must be a common feeling, which, irritated in

\* Comp. Villani, Ist. Fior., b. vii., ch. 88, "on a noble company which was gotten up in Florence in 1283."

one place, offers resistance and instantly awakens sympathy and calls for aid in many others. Sometimes these sudden movements spread with such electric energy that they seem like material phenomena. The Sicilian vespers afford a fine illustration of this. The cause of insurrection lay in the atrocious and insolent oppression of the southern Italians by the French under Charles of Anjou. Already, by the efforts of one man, John of Procida, the island had been prepared for a revolt. But the immediate cause lay in this, that the French officials made use of the law against wearing concealed weapons, to examine ladies on their way towards a church outside of Palermo, in a most revolting manner. The French were cut down by the Sicilian men who accompanied the dames. Instantly the cry "Down with the French" flew to the city and over the island; everywhere the French were attacked; the garrison of Messina was murdered by the people. It is not probable that the conspiracy had anything whatever to do with this. The conspiracy of John of Procida, and the scene at the vespers of the Easter day, point to one and the same cause. In fact, the outbreak at Palermo might have frustrated the revolt itself. Aristotle remarks (viii., or v., 3, § 1), that "civil strifes arise *not concerning* small things, *but out of* small things. But men strive about great things." And he gives an instance from the history of Syracuse, which is parallel in some respects with the Sicilian vespers.

Aristotle's fifth book of politics (or, as with many I shall call it, the eighth) is wholly taken up with what Aristotle on revolutions. may be called revolutions. The Greek word is *stasis*, a wider term than revolution, somewhat answering to the Latin *seditio* (*i.e.*, a *going apart*, or in a different direction—a secession).\* We shall use *stasis*, in referring to Aristotle's opinions, as equivalent to our *revolution*.

\* In Greek, also, the word *metastasis*, a strife involving change, is used, but is not very common. By this word is denoted the overthrow of the democracy (the *δήμον κατάλυσις*) at Athens, in 404, in an oration of Lysias. (c. Nicom., § 3.)

Aristotle proposes in the eighth book to consider the various causes of political changes, the peculiar sources of the destruction of each particular polity, the course which the changes take in each of them, and the ways of saving each of them from the influence of these injurious causes. The general cause of revolutions is the same that gives rise to a difference in forms of polity; it is a general agreement in what is just and equal, with a difference in carrying such views into practice. Thus, democracy arises from thinking that those who are equal in some respects should be absolutely equal; and oligarchy, from thinking that inequality, which exists as it respects property, should be extended so as to include inequality in civil *status*. Hence, men in the former, as being equal, claim to have an equal share of everything, and in the latter, as being unequal, claim to have more than the others. For the *more* is inequality. Thus, they have some reason in their claims but are absolutely in error. With the best reason would those engage in civil strife who are persons of the greatest worth, and yet they do this less than any others; for it is especially reasonable that these, and these only, should be absolutely unequal to others. (Ch. i., §§ 1-3.)

The changes of polity arise in two ways: sometimes the strife turns on the point whether the form shall be changed; sometimes the parties would prefer the existing polity, but wish to administer it themselves, or to make it more intense or less so, as for instance, to lower the tone of an oligarchy or raise it, to make a democracy more or less democratical. Again, the strife aims at changing a particular provision of the polity, as, for instance, at abolishing or establishing a certain magistracy; so some say that in Lacedæmon Lysander aimed at destroying the royal power, and King Pausanias at destroying the ephorate. (§§ 4, 5.) Democracy is safer and more free from civil strife than oligarchy, for the latter is liable both to strife between the members of the oligarchy and between them and the *demus*. But in democracies the only strife is with the oligarchy; between the parts of the



demus themselves there is little of strife worthy to be mentioned. (§ 9.)

The causes of strife and political changes are reducible to three, according to Aristotle. (u. s., ch. 2.) These are the feelings of those who engage in strife, their motives in so doing, and the determining causes or the origin of the political disturbances. The determining causes are seven: ambition, desire of riches (both awakening the desire of becoming equal to others), insult, fear, superiority, contempt, the disproportionate increase of the parties in the community. Concerning this latter cause, he remarks that sometimes the disproportion referred to grows up imperceptibly, as in democracies the poorer classes may increase unawares. Sometimes a single disaster may bring about the same result, as at Tarentum, when the people were defeated and many of the notables were slain a little after the Persian invasions of Greece, the republic was changed into a democracy. This may happen in democracies, but not so frequently as under other polities.

The *occasions* of political overturnings are often trifling in themselves. This remark, which has been cited already, Aristotle fortifies by a number of historical illustrations. Such occasions are seized on the more readily, when the parties or factions are nearly equal and there is no considerable party lying between the two. When, however, one faction is decidedly superior to the other, the feeble one will not incur the risk of open strife. "For this reason those who excel in personal worth scarcely ever stir up party strife, for they are found to be few against many." (ch. 3, § 7.) As if they would without scruple seize on the power of the state if they felt themselves to be stronger than the other citizens!

The changes in democracies are chiefly due to the wanton conduct of demagogues, who by their false accusations of wealthy individuals force them to conspire together under the influence of a common fear, and, again, in public matters lead the people on to rise against state order. Thus, in Cos, the democracy was overthrown by

Changes in democracies.

a coalition of the upper class against mischievous demagogues. In Rhodes the demagogues procured that the revenues should be distributed as pay to the people (?), and stopped paying the trierarchs what was due to them [for advances to the state on account of their galleys]. To escape oppressive suits the trierarchs conspired and overthrew the popular government. In Heracleia [Pontica], soon after the settlement there, the democracy was abolished, owing to the violence of the demagogues who banished the notables; and they, collecting together, returned to put down the popular government. The same happened at Megara, whence this colony at Heracleia went forth, owing to the banishment of wealthy citizens and confiscation of their property by the demagogues. The oppressed wealthy class succeeded in establishing an oligarchy. In almost all similar revolutions in democracies the course of events is much the same. Sometimes the demagogues, to please the people, force the upper class into conspiracy, by oppressing them; then either they divide up their estates or consume their revenues in public services, or they bring charges against them in order to confiscate their property. In the old times, when the same man was demagogue and general, the politics assumed the tyrannical form, almost all the ancient tyrants having been demagogues at first. The reason why this happened then, but does not happen now, says Aristotle, is that then skill in war brought the demagogue forward; now it is skill in oratory that does this. These popular leaders of to-day, on account of their ignorance of military affairs, seldom use violence to secure their ends. Formerly, also, tyrannies arose more than now from the greatness of the power entrusted to a single person; or from the fact that the cities were small and the citizens to a great extent lived on their lands, which afforded facilities to the popular leaders, where they had skill in military affairs, to get control over a population busy in their own affairs outside of the walls. Again, there are changes from a democracy handed down from ancestors into one of a new-fangled kind. "For where the public officers are chosen without

any property qualification, and the people chooses ; those who are eager for office by their demagogical arts bring things to such a pass that the people become lords even over the laws. It would cure, or at least abate this evil, if the tribes should each choose a part of the magistrates, instead of the whole *demus* choosing them by a collective vote." (ch. 4.)

After detailing the causes of political changes in oligarchies (ch. 5) and aristocracies (ch. 6), Aristotle passes on to consider the means which lie within the reach of these polities for their own conservation (ch. 7). He then examines the causes of political change in monarchies and tyrannies (ch. 8), as well as their power of self-preservation (ch. 9). He closes this important book of his politics by examining Plato's theory of revolutions, and criticises especially the order of succession which is assigned to different polities in the eighth book of the republic. We have space only for a brief review of the chapter touching the ability of republics to resist revolutionary changes.

If we know how polities are corrupted or destroyed, we know the means by which they may be preserved. In all well-constituted polities, and especially in democratic ones, the highest care is needed that no illegality be allowed. Deviation from law undermines a state imperceptibly, as small expenses often incurred waste properties. The changes escape remark because they do not take place all at once, and the understanding is cheated by them. Another thing to be avoided is the use of those political sophisms which are employed for the purpose of imposing on the people. (Pol., viii., or 5, 7, §§ 1, 2.) Many aristocracies and some oligarchies owe their permanence not to the safety of those polities themselves, but to the wisdom of the magistrates in their treatment of both those who have a part in the government and those who have no part. Again, a short term of office is an aid against factions, as thus a greater number can enjoy power. Aristotle mentions the term of six months, common afterwards in the republics of mediæval Italy. Another way of preserving polities from

Aristotle on keeping off revolutions.

ruin is by bringing the danger of it before the eyes of the well-affected citizens. Sometimes even fears ought to be awakened, in order that men may be vigilant and not relax their guard over the constitution, like watchmen in the night. The quarrels, also, of the better classes must be looked into, and others who have stood aside from strife be prevented from taking a part. (u. s., §§ 1-5.)

Sometimes a political change from an oligarchy or a republic to a democracy arises, because the valuations of property, on which political capacity is founded, remain the same, while money has become more plentiful. To prevent a change due to this cause, the valuation of property ought to be revised within short intervals, so that the lowest valuation according to which political privilege is given may vary with the value of money and the increase or diminution of individual possessions. Otherwise, where the lowest valuation cuts off a great number, an oligarchy will be likely to take the place of a republic, and a dynasty the place of an oligarchy; and in the reverse case a democracy will succeed to a republic, and a republic or a democracy to an oligarchy. (u. s., §§ 6, 7.)

In all these forms of polity, the attempt should be to give trifling but lasting honors or functions, rather than short and important ones; for power corrupts, and all are not able to bear prosperity. Especially should the aim be by means of the law to prevent any one in the state from becoming very prominent in wealth or number of friends; or, if this cannot be, to take care that they be relegated into foreign parts.\* Those who live in a way inconsistently with the polity ought to be under the police inspection of a magistracy having this for an object, since it is owing to the habits of individuals that innovations creep into a community. The advancement of a state in prosperity ought to be ever kept in view, and the men of different conditions, as the rich and poor, the well-

\* The history of many small states in Greece shows what constant watch was needed against men of another party, especially against rich party-leaders. In large modern communities this fear and jealousy are no great causes of evil.



born and the mean, should be together entrusted with the affairs and offices of the polity ; and an intermediate class between these extremes should be increased as much as possible. (to § 8.)

A most important point in every polity is to make such provision, by law and in other ways, that public office shall not be a source of gain. Especially is this to be kept in view in oligarchies, for the mass of men are not so much irritated by being shut out of office,—nay, rather they are glad when they are allowed to pursue their private affairs quietly—as they are, when they think that the rulers are stealing the public money. Then it is that they are grieved, both because they have no share in the offices and have none of the gains. This evil will be prevented when the public posts are not lucrative, for then the poor will not seek for them, and the upper class will be unable to misuse them for purposes of gain, and yet be ready to fill them as places of honor. And thus the poor will become affluent, because they can give their attention to their own callings, and the upper class will not be ruled by their inferiors. In order to prevent the stealing of public money, let the handing over of the funds entrusted to public officers take place in the presence of all the people ; let copies of the accounts be lodged in the archives of the tribes and other subdivisions of the state ; and let appropriate honors be bestowed on those who have managed public affairs without making office a source of gain.

In democracies the wealthy ought not to be put to great expense, nor even to be allowed to use their incomes in expensive but useless public services, such as taking the lead in choragic shows, torch-races, and the like. In an oligarchy much care should be taken of the poorer citizens, and offices be given to them from which they can receive a salary ; and should any of the wealthy treat them with contumely or outrage, the penalty ought to be greater than if they should so treat their own class. In this polity, again, inheritances ought not to go by donation, but only by birth, and the same person ought not to be allowed to receive more than one in-

heritance, for in this way estates will be more nearly equal, and more of the poor will become affluent.

After recommending that, in an oligarchy and a democracy both, it is best to give equality or even pre-eminence in minor political employments to a class which is not predominant in the state—to the rich in democracies, to the poor in oligarchies (§ 13), Aristotle remarks that all things in the laws of a polity conforming to its nature tend to preserve it. Above all, ought the portion of the community that wishes to uphold the polity be made stronger than that which would prefer its overthrow. Especially should the middle between extremes be sought for and secured—that which governments deviating from their true type neglect—for many seemingly democratic institutions destroy democracies, and many of the oligarchic kind destroy oligarchies. Some persons, thinking that the excellence of a polity is one and simple, push things to an extreme. But both oligarchy and democracy, although at a remove from the best form of government, can do their work tolerably well as they are; while, if either of them becomes more intense and true to its own type, the polity will, in the first place, become worse, and at the end will become no polity at all. The lawgiver, therefore, and the political man ought to understand well what democratic institutions save democracies, and what oligarchic ones save oligarchies. Now, since neither of them can exist and flourish without the wealthy and without a *demos*, and since by an equality in property a polity must be changed, do not they who destroy either part of the citizens by laws favoring the superiority of the other destroy the polity itself? Faults are committed under both kinds of governments. In democracies the demagogues err when they make the will of the common people superior to the law, since, by attacking the wealthy, they divide the state in twain. Far from this, they should always seem to take the part of the wealthy, and so should the heads of an oligarchy seem to advocate the cause of the poor. And in the latter of these constitutions the oaths that they ought to take should be opposite in their import to those

which they take now ; for now, in some city-states, they take an oath in words such as these : " I swear that I will bear a hostile mind towards the *demus*," whereas they ought to act in just the contrary character, and swear, " I will not wrong the *demus*."

The most important rule for conserving a constitution, according to Aristotle, is that which, at his day, was entirely neglected—to conform the education to the character of the polity. For there is no value in the most useful laws, agreed upon by all who live under a polity, unless manners and training are in conformity with it, looking towards the popular side if the constitution is popular, and towards the oligarchic side if it is an oligarchy. For the want of self-restraint belonging to an individual belongs to the state. To be educated, however, in conformity with a polity, is not to learn how to do that which would please the oligarchy or the democracy, but that by means of which one can live under an oligarchic or a democratic constitution. But, as things are now, the sons of rulers in an oligarchy live in luxury, while those of the poor become inured to bodily exercise and toil, which makes them more willing and able to engage in new political schemes. And in democracies, even the most democratical, the interests of the state are not observed, on account of a prevailing false conception of liberty. Into this conception two elements enter—that the majority should have the power, and that there should be liberty. Justice is thought to consist in equality, and equality means that whatever seems best to the majority that is to have force of law, while freedom and equality are made to consist in every individual's doing as he will. But this is evil. For it ought not to be thought to be a slavery to live in conformity with the institutions, but a means of safety.

In the very important book of his *Politics* of which we have given a partial sketch, Aristotle does not speak, we believe, of the reconstruction of a state already overturned by revolution, nor among his precepts for sustaining a government against revolutions does he go much beyond rules of policy.

In fact, from the nature of the relation between the individual and the state, as it was apprehended by the Greeks, it was not possible to go much farther. And yet he has investigated this department of politics with a clear eye, and no one since his time seems to have added much to what he has here brought together, except so far as the history of large states and the experience of principles on a large scale has enlightened them. A full discussion of revolutions, especially of modern revolutions, is a desideratum yet to be supplied. We intend to look at one or two aspects of the subject only.

We have elsewhere remarked that the word *revolution* is Comprehensiveness of the word revolution. so comprehensive as to embrace various movements of a sudden kind, aiming at political changes, and including as well changes in one or two respects, as those which contemplate the complete political transformation of society. Thus, the movement that ends in a change of dynasty, or in removing the existing sovereign and putting one of his near kindred in his place, is equally called a revolution with one which obliterates differences of ranks, disestablishes a church, abolishes royalty, and alters the tenure of land together with a large part of the law that has come down from the past. There is but one event generally known as a revolution in English history, and this had far less of a revolutionary character than others which have not obtained the title. It consisted in the bloodless flight of a king who had endeavored to subvert the laws and institutions; in a convention-parliament's declaration that the throne was vacant, and their invitation to his son-in-law and his daughter to reign in his stead. He packed up his luggage and went across the channel. That was the visible event, the body of this revolution, which had indeed a soul much larger than its body. Now, why was this all? It was owing to the great transactions of nearly fifty years before, which were not called a revolution, and yet for a time and before the right time made a general overturning in the whole political fabric. The recollection of those events and of what befel the sovereign was a power that acted on the mind of the king and court to



prevent a struggle, and thus the wars of the parliament with the king prevented the recurrence of the same calamities afterwards. Nor are the previous usurpations and depositions of kings—Stephen's seizure of power, the accession of the house of Lancaster, that of the house of York, that of the Tudors—called revolutions, although great changes were made by force in the governing power.

Some revolutions, again, are carried on in such a spirit of legality, that the administration of justice goes on during the progress even of civil war. The justices went on their circuits, in the English strife between king and parliament, protected by military escorts, as if nothing had disturbed civil order. In our revolution, there was no breaking up of the existing governments, except at a few points; the laws were executed, legislatures met, taxes were levied; and it shows in a striking light the respect for order among the people, that until after the peace with England, there were no tumults caused by the extreme distress of society, and scarcely any conflicts between the loyalists and the party of the revolution.

In many of the modern revolutions, the governments have promptly yielded, in the intention, no doubt, to bring back the old state of things at the first good opportunity. An *émancipation* in a capital, followed by a flight of the court, the defection, perhaps, of a part of the army, a provisional government, a new constitution—such are some of the phenomena which startle a nation like a great storm, and indeed are but political storms of short duration. When they end, it is the past political education of the people, with its moral convictions, that determine whether the revolutions will recur again, or whether the provisions for order suggested by a nation's experience will prevent them in the future. These revolutions in the capital or in the large towns indicate no general change in the feelings of society, nor any general demand for the rectification of real abuses. They are rather the results of certain social or political theories, aiming at a theoretical change in a constitution, together with the reformation of the more glaring abuses in adminis-

Treatment of revolutions by governments.

tration. They do not spread over a whole country, but are confined to cities, and to a few fervid minds in cities, which claim the right of changing the political institutions by force, whether they be few or many ; for it is the doctrine of some political fanatics, that a revolution needs, in order to be legitimate, the concurrence neither of the majority, nor even of the thinking part of a nation ; but, as the theory is right and they are willing to take their lives into their hands in supporting the outbreak, it seems to have a sufficient sanction from its own nature and their disinterestedness.

Thus, there has been in a number of modern revolutions a want of practical wisdom which is truly astonishing, an incapacity to build up, a fanaticism more fierce than ordinary religious fanaticism. The hot-heads miscalculate success, and are regardless of the opinion of the nation. If they can conquer, the state is theirs. If, meanwhile, the mass of the industrial classes is passive and motionless, absorbed in daily toils, with no public thoughts, it may be easy to alter a constitution. But it will be easy also to undo what such a revolution has wrought, and difficult to build up again what it has undone, to restore public confidence in the stability of the state. There is great truth in Pindar's words (*Pyth.*, iv., 272-274), that "it is easy even for a weaker sort of men to shake a state ; but to seat it in its place again proves to be difficult enough, unless a God, of a sudden, becomes a pilot to its leaders." If only a chronic tendency towards revolution and a chronic fear of it are left, the result is bad enough, and does not help on true freedom. The revolution of 1848 in France was due to the communists mainly, and the fears of the middle class were a great support to Louis Napoleon : when thus a revolution belongs to a sect or junto, there is a fair probability that it will be transitory.

Most modern revolutions have differed from similar events in the ancient city-states in the greater prevalence of a moral conviction that the cause was right, of a political kind founded on ethical principles, and not only not inconsistent with religion, but defended on reli-

Ancient and modern revolutions compared.

gious grounds. Mr. Guizot remarks, that while the English revolution of 1640 was essentially political, "it was accomplished in the midst of a religious people and a religious age." (Hist. of civiliz. in Europe, lect. xiii.) In our own case, a large part of the most religious people of the colonies went into it with deliberation, as into a most solemn work of self-sacrifice. Mr. Buchez (tr. de politique, ii., 492) makes a similar remark in regard to the French revolution: "The constituante of 1848 has completed the work of the constituante of 1789. To the doctrine of rights it has added the doctrine of the duties of men and nations. These revolutions are both equally of Christian origin. The filiation of principles is incontestable, and, I venture to say, evident." And again (p. 495): "Unbelief or irreligion is considered by many people, friends or enemies of the revolution, as the attributes of the revolutionary spirit." But, "in fact, the revolution is a work of faith and of devotion. Those who accomplish it will not enjoy the good things that it promises. One of the great benefits of religion is to teach men to believe in things spiritual and invisible. Now, what is there more invisible than liberty and fraternity, before they become real and customary? What is there less material and more invisible than the ideal of the future. The truth is, that the revolutionary spirit is opposed to scepticism. It did not produce scepticism—it submitted to it."

If Buchez, confounding the ideal and the spiritual, meant to take the spirit of Christianity without the doctrine, in a large philosophic sense, and thought *equality* and *fraternity* to be equivalents of Christian brotherhood, there would be some consistency in his remarks. But he does not hold to such equivalence. The notion also is untenable. Equality of rights is not a distinctively Christian conception, but belongs to the general conception of rights; and, of course, a religion with the highly ethical character of Christianity cannot be hostile to justice. And fraternity is a caricature of Christian brotherhood, a mere phantom with no such inward substance or active power as belongs to a religion of

redemption. We can say, then, that such ideas are due to Christianity as their *causa sine qua non*, just as free thinking is due to it; but this notwithstanding, they can consist with deadly hatred to Christianity and with deadly selfishness. We can conceive of a Christian as fighting under the flag of fraternity, but not as taking it to represent the spirit of the gospel.\*

The forms of government least exposed to revolutions are Governments least exposed to revolutions. representative democracies, and constitutional governments where an enlightened public opinion prevails.† Despotisms are safe from it, owing to the want of a public opinion, to the difficulty of combination and the inexperience of those who are oppressed. But under such governments, court-revolutions, if we may call them so, may prevail, for the despot is powerless against a faction of his principal servants. In a democracy with a constitution containing the rules for correcting its own deficiencies, the way of revolt is generally so unreasonable and wasteful as to carry condemnation on its face against those who resort to it. In governments like England, where public affairs are administered, under an enlightened but somewhat fluctuating public opinion, for the good of the whole, the apprehension of future evils prevents them, and the demand for reforms is discussed in the country before it comes into parliament. There is in such a country scarcely any room for the revolutionary spirit to act. Accordingly, while agitation and armed strife have convulsed the continent, England has been quiet, reforms of the most important character have been there carried on, one by one, through the last forty years, and the country has such political experience, that revolutions, unless caused by the miseries of the poor in adverse times, seem hardly possible.

As in most other nations of Europe a large part of the

\* Paul Janet, in a small work entitled *Philosophie de la rév. Française*, has examined Buchez's views from another point, p. 60 and onward.

† Comp. Arist., Pol., viii. or 5, 1, § 9, already cited near the beginning of this chapter.



causes of disquiet have been removed, it is probable that the revolutionary age is passing away. Nor can we deny either its necessity, as we look back, or that its results have been to a considerable degree good.

The different course which revolution has taken in different countries is due to national character and special historical or social causes. In only one country did it grow up out of the soil, so to speak; in all others the principles of free thinking, the doctrine of human rights, and the demand for political reform were imported, and recommended by the social influences and fashions in the country which was its proper birthplace. Why was it that in France the modern revolutionary spirit arose? Why was it that, after nearly ninety years, this spirit has destroyed so much in order to construct so little?

The rise of the revolutionary spirit in France is due to several causes. One of these is that when the absolutism of Louis XIV. had destroyed ancient institutions, it put nothing in their place, that thus the government became weak under the worthless Louis XV., and that the brilliant wits who governed French society were now able to leaven public thought with the principles of free thinking.\* Another consideration to be taken into account is that the financial weakness of the government, not long before the outbreak of the revolution, rendered it less capable to resist any movement which might arise within the country. One example from abroad—our revolutionary struggle, in which we had the sympathy and aid of France—greatly corroborated the political principles and increased longings for a better constitution awakened by Montesquieu's *Spirit of the Laws*, and animated by Rousseau's social contract. It might seem strange that abuses coming down from the feudal system ought to be added to these as an important auxiliary cause; but de Tocqueville has taught us, in his *Old Regime and the Revolution*, that French life was groaning under the burdens on the land and on the peasantry which this defunct institu-

\* Guizot, *Civ. in Fr.*, lect. xiv.

National character as influencing the course of revolutions.

Revolutionary spirit in France.

tion bequeathed to the future, while the administration of the provinces and towns was exceedingly wretched.\* When the government of Louis XVI., a virtuous and harmless ruler, fell into financial difficulties, the cry was raised for the States General, which had not been called together since 1615. On their assembling the third estate, in number double of the two others, induced the clergy first, then the nobles to join it, and this body, as the National Assembly, brought on the first act of the revolution.

The rights of Frenchmen were now established, a constitution was formed, the laws were made over again and the old institutions of society were destroyed by inexperienced and fanatical legislators. A natural opposition from neighboring states excited the military spirit, and the country was financially ruined; but the military leaders, getting the better of fanatical reformers, brought on a reaction, and in the natural course of things from extreme democracy to the *tyrannis* an empire was set up, under which order and security returned to France. The experience of the frightful excesses of revolutionary frenzy, and the gratification of national pride from the wonderful career of Napoleon, kept down the revolutionary spirit, and at his fall the Bourbon dynasty was restored without the free will of the nation. The revolution which put the Orleans Bourbons on the throne was like that which put William and Mary in the place of James II., and it was not until the expulsion of this dynasty in 1848, by a conspiracy of revolutionists rather than by a national movement, that the course of revolution from within again commenced. This democratic overturn was soon replaced by a democratic empire, chosen for the sake of national security and not for its own sake. The false and flagitious empire fell by its misfortunes in war in 1870, since which time—after the overthrow of the rule of the mob and the commune—a republican government with no definitive form and no certain future has

\* Mr. Taine's new work on the ancient regime shows, by a vast amount of details, the deplorable state of France in the last century. Nothing could more completely justify a revolution.

been gradually gaining strength, and shows a moderation unusual for France. As the royal and the imperial lines of aspirants to the throne cannot be united and are both losing ground, as the parties have concurred in establishing a second house or senate, and as political experience is now more valued than theory, the prospects of France for a permanent form of polity are better than they have been for a long time. And yet there are elements of instability there, such as the want of an intelligent, well educated body of small landholders, capable of forming an independent judgment and not passive in political affairs; together with the concentration of opinion, ready to use force if necessary, in large towns—above all, in Paris,—which make it doubtful whether the nation that is so ambitious to govern itself is equal to the task.

We may inquire in this place, how are revolutions to be made fewer or prevented for the future? When Can revolutions be prevented, and how? Aristotle discussed this point he had a harder problem to solve than is presented in modern civilized and Christian society. In many Greek city-states the factions were like hostile camps watching one another; excited feeling rushed to the execution of a plan and worked vast evil before time for reflection came on. Suspicion, fear, fraud, reports of secret dealings with foreign allies, made an outbreak sometimes a relief from the tension of the present. In large modern states such causes, if they exist, cannot be so quick in their operation; and, as we have remarked, the prospect that reforms can be effected in a constitutional way retards revolutionary feeling or diverts it from making use of force. The police systems of modern societies put governments in possession of the reigning opinion throughout a nation. A free press, where it is allowed, does the same office, and however violent or reckless it may be, generally gives warning of what is in the mind of the factions. The danger to the stability of state institutions comes, it is true, not so much from opinion exploding into action, as from slow, unperceived changes in opinion. Yet these slow changes are more within the reach of estimation than they were a century

or two ago, for the literature and journals continually place them before the public eye.

Everything will prevent revolutions which impresses a people with the conviction that the government aims at justice and the public welfare, and which places the people in a condition to form judgments on public measures. All education, if it embraces instruction in moral and political duties, all practice and political experience in local and municipal affairs, all historical knowledge, and other means by which national feeling is increased, are sources of the spirit of order. And when, from a people educated by the institutions of the country, a voice comes demanding reform, such a voice will be heeded; the opinion of an enlightened people has a power that governments dare not resist. Thus mature, wise public opinion is a great safeguard against revolutions.

What effect on the prevention of revolutions is to proceed from the modern practice of training up the young men for a certain time to the use of arms? A standing army has a natural antagonism to the ordinary people. Being a profession, it will have a professional feeling separating it from the general interests of the country. But they who are in training, and especially they who have served out their time and have returned to peaceful occupations, are not thus divided off by a line from the rest of the nation. It is to be supposed that they will better comprehend what war means than others, and will act on the side of existing order, if not of reform—not as soldiers, but as citizens who have had a little of a soldier's experience. On the other hand, a faction or a government can be less sure than formerly of the fidelity of the soldiers of the line, if it is plotting the overthrow of a constitution, than formerly; for the soldier has been trained up, under modern ideas, to feel himself a citizen also. Yet there is a danger, on the other side, that an administration, in concert with officers of the army, will make use of the soldiery in *coups d'état* by which a constitution will be overthrown, or so much of it as the government dislikes. This would be one of the worst kinds of revolution—a revolution in which the



government, sworn to obey the constitution, was the principal actor. So long as, in any nation, the upper class does not believe in constitutional government, and the administration wants larger powers, this danger must be allowed to be considerable. If such a case should actually occur, it would be, most probably, the beginning of new revolutions, and might lead in the end to something in itself very desirable—the diminution of standing armies on the urgent demand of the people.

§ 275.

*National decline and decay.*

The decay of nations and of states is a commonplace of declamation, and has been constructed into a theory resting on a sort of resemblance between the human body and the body politic. As the single man slowly develops into manhood, and then, if not cut off, sinks into decrepitude and disappears by death, so the nation grows, reaches its acme, and ceases to be. The analogy would be closer if every man, as he grew old, became less capable to govern himself, and so died through the decay of his moral faculties. If a nation continued to advance in the capacity for self-government—if it became freer, nobler, and more enlightened, like some men in extreme old age, what is there to produce national decay? The light and truth, the moral and political wisdom that is collected in the world can be taken up continually by the newcomers into it. The forces that aid political stability continue the same at least, if they do not grow in influence. Education may be better and more general; religion in the life more noble, in doctrine more simple and pure; family life need not become corrupt; art may reflect the sentiments of pure minds. If this is possible, why should society or a polity become worse through mere continuance?

It will probably be conceded that such considerations as these have some force, and will be said that  
National decay not inevitable. decay is not a fatal necessity for a nation; but that, as ruined empires and ruined city-states in abundance

demonstrate, there must be destructive influences at work in every nation, which are apt to get the better of the conservative influences sooner or later. Every form of civilization contains some worm in the bud, every nation suffers for its own misdeeds ; it is, in short, the weakness and short-sightedness of human nature acting on a large scale, to which national decay is due.

Without denying the justice of these remarks, we will enquire what are the leading causes likely to bring on national decay, and whether a nation can have a hope of reform, when once its course is thus downward.

1. The cause from which evil is more commonly apprehended is the increasingly unequal distribution of property in a country, as it continues its industry through ages. There will be a few very rich persons and a vast multitude of very poor, with a middle class more or less numerous, according to the varying success of their labors. The rich, for want of other investments, will monopolize the land, receiving it in payment of debts, or being content with a small interest on their money. The proletarian class must live from hand to mouth, without much intelligence, exposed to great temptations, becoming weak in body and in mind through the influence of unhealthy food and lodgings, a prey to diseases, a prey to demagogues. The unity of society is destroyed by this unequal distribution of wealth ; one part, the upper class, can have no great intercourse or sympathy with their antipodes, and thus there is no political security. Hope must abandon such a society and vigor of action ; how can it live when these are gone ? The freedom of a government has little influence in checking these evils. It makes the successful more successful, because he can go anywhere and devote his capital to any use. It rather brings on inequalities sooner than another sort of government. L. Marcius Philippus affirmed, in a public speech at Rome, that there were not two thousand property-owners in the state ; (Cic., *de off.*, ii., 21, 73), and Pliny the elder says that “ broad farms (*latifundia*) have

Causes which are thought to be sure to bring it on.

Unequal distribution of property.

ruined Italy and the provinces." He adds that six land-owners held possession of half of the province of Africa, until Nero had them put to death. (Nat. hist., xviii., 35.) The gradual gathering of land in England into fewer hands, and the disappearance to a great extent of the old yeomanry, is well known. How can a nation thrive for a long time, where "wealth accumulates and men decay."

Such is a fair view of the evils to which nations are exposed where the liberties of buying and selling land are great. But is there no other side to the picture? There are, as it seems to us, advantages both industrial and moral on the side of nations which have accumulated large amounts of capital, and where, consequently, the profits of capital and the interest of money are small. For the capital must be contented with small returns and commodities are cheap, so that the whole community, laborers and others, derive a benefit from the low price of articles needed by all. Then, unless the laborers are too many relatively to the capital, their share of the whole produce will not be diminished, because the large capital is a constant demand for their services. Add to this that where the returns to a given amount of capital are small, there is a constant motive to thrift and abstinence, so that industry, carefulness, self-restraint find in such a state of things a greater motive to their exercise than in countries where it is easier to grow rich. There is no necessity then that a large amount of wealth in a country should make it hard for the laboring class to live, or even to raise their condition by the use of the capital of others. The amount needed to carry on a given enterprise is less, the interest to be deducted when money is borrowed is less, and the willingness to lend as well as the ability to borrow on good security greater. The comparisons often made between old and newly settled countries, in favor of the latter as homes of the poor, are in some degree deceptive. If land is cheap and abundant there, that is a great thing. But the large wages in all employments shrink when you take rents and the prices paid for commodities into account.

Another consideration in favor of Christian lands that have accumulated large amounts of capital, is that institutions of humanity and enlightenment are to be found there in abundance. From age to age men have been founding hospitals for the sick and the diseased ; the necessitous are sure of help from private or public sources ; the children of the poor can find access to schools of various kinds ; churches are open to them at a low cost of pew-rent or without rent. We must place the condition of the poor, therefore, in Christian lands which have long been settled, far above what it is in most other countries, where neither public nor private charity flows forth from the rock of selfishness.

This again ought to be taken into account : that as long as the world contains room for new colonies, the countries which send out such colonies are those where there is constantly new capital ready to undertake new enterprises subsidiary to national prosperity, and that the class looking for better circumstances abroad, consisting in part of laborers, will leave room for others at home. The colonies also, as customers, will greatly aid production and labor in the mother country.

It is, however, we admit, in such old countries with abundant capital, that crises in the world, panics arising out of political causes, are apt to be felt most. It may be that great industries employing vast numbers of laborers are prostrate, and the workmen at a loss how to sustain their families. Yet even in such countries, whose extensive connections with the rest of the world are like nerves carrying pain through the body, it is probable that in hard times the distress is not so great as it is in countries cut off from connections with other lands, where there is no capital laid up whatever, where every season suffices only for the wants of the next, and suffering from famine finds no help or alleviation. It is an old remark that in thinly settled, isolated countries, failure of crops is more disastrous than elsewhere, and famine was one of the motives of the *ver sacrum* in Italy.

We may say then, I think, that great accumulations of capital in a country are no cause of distress in the laboring



class ; that where money is saved with difficulty there will be most thrift and morality ; and that, when this state of things exists with free institutions and free proprietorship, there need be no decay.

2. It may be said, again, that there is a condition in countries answering to the youth and another to the old age of a man. In his youth he is active, resolute, enterprising, not deterred by difficulties or loss ; in his old age cautious, inclined to save rather than to gain, unfit for any new business, timid, saving. So a nation at one time enters with zest into the complications of politics, is not averse to the risks or the expenses of war, has large enterprises on foot ; while at another it lives within itself, keeps at peace with all foreign powers, directs its attention towards the problems of industrial and social life. In the latter condition there is something like stagnation, something like the feeling of an old man who avoids quarrels from fear and prefers quiet to all things. There is no doubt that a nation may seem from its love of peace to have lost its spirit, and it may thus provoke contempt from its neighbors. Holland and Belgium seem to have such a character. But while the warlike and stirring virtues which men are so apt to admire have faded out from the life of such a nation, it will not follow that this ought to be regarded as a sign of decay. Man surely cannot be made for war, and a state of society among the nations in which no wars exist ought not to be thought to have lost one of the excellences of human character.

3. There may be a decline in a nation's valuation of itself, and a feeling of discouragement, due to loss of prosperity and to relatively greater advances of its neighbors. Commerce and industry may pass over to another nation more intelligent, with better natural capabilities, which is able to bring its wares into the markets of the world at a less cost. Or another nation may take a great start, owing to some superior line of policy and a better administration, as Prussia has got the start of Austria in the

Is there a natural  
old age of states ?

Decay of a nation's  
self-esteem.

present age. Or great political mistakes may throw a nation into the background, producing discontent within and discouragement in regard to external relations. But do such causes as these, which certainly change the relative place of different states, of necessity alter the political condition of states for the worse? May they not equally well produce sobriety, caution, a more contracted policy, a more careful husbanding of all national resources, a greater desire to prevent all complaints of the people against the government? If this can be the result, the political condition may be greatly benefited, and the successes of other states, or the feeling of humiliation, may be followed by a new and better period of national life.

4. There may be, again, a decline in literary and artistic ability within a nation. An age brilliant with Decay of genius and culture. genius in poetry, eloquence, and the arts, may be followed by one of great sterility—one that is given over to false taste and false art. A nation, like a man, cannot without shame and discouragement feel itself to have done its best, and to be doomed in the future to mediocrity and imitation. Where the decay of taste and the want of literary genius may be traced to something false, some demoralizing element in the civilization of the country, or to superior motives for activity in other pursuits, or to political evil, they must exist until the cause be removed. But at the most this can be a cause only concurring with other and deeper causes of decline. There would have been no good reason for discouragement because the epic age lay far in the past of Greece, beyond even the historic period; for afterwards came the age of lyric poetry, of tragedy, of history, eloquence, and philosophy in succession. There never could be, perhaps, another Shakespeare in England, and in the ages of the later Stuarts and first Georges everything sank down. But a yet later period showed that there may be a revival of national genius, as soon as some load of false principle is taken off or some new spring is applied. Perhaps the shaking off of falsehood at the revolution of 1688 and the awakened moral

and religious sensibilities of the next century were principal causes in this change.

5. Political degeneracy, if permanent, may be a cause of national decline. And it can easily happen that a nation, after vain attempts to right itself by revolutions, will give over hope for the future and be content to sleep on the cold breast of power, rather than toss and turn any longer. Thus, what can be more cheerless than the history of the Roman empire ; and what a difference there was between the political activity during the growth of the constitution, and the quiet despair of the mass of the people from Augustus onward. But this political ruin was an effect of a moral ruin, not a first cause ; and a nation that has lost its character must decay politically until some new condition of the world quickens it again into life. The vices and self-indulgences produced by conquest contributed their part to this decay, and the conquest of the world reacted on the polity and character of Rome itself ; but if the character of the people could have kept its early integrity and some of its hardness, the changes would have been far less.

6. We come last to the decay of faith, and decay of morals going with it, as sure signs of national decay in all respects, in political life, social institutions, and all that gives pre-eminence and vigor to a nation's life. What we call the decay of civilization is indicated by many symptoms. Among these are the false art and taste which we have spoken of ; the tendency to self-indulgence and the absence of the sterner self-asserting virtues ; the loss of interest in political life as well as of political virtue ; the selfish reluctance of individuals to exert themselves for the public good ; the cosmopolitan feeling that owns no bonds of country ; the disposition to sneer at heroic virtues and to doubt the worth of things valued in older times—all of which involve a dissolution of the tie that binds a man to his country. Of course this state of character makes political life corrupt, and weakens the stability of a government. But below this lies a profligate condition of morals, marked especially by falsehood

and excess in pleasure ; and below even these is a loss of faith in religious realities, a want of belief at once in God and in moral virtue. This may take the positive form of absolute denial of any divine existence, united with contempt for elevated motives of action, which made the full-blown ancient tyrant ; or the painful scepticism that wanders from one creed or philosophy to another, doubts everything, and is too irresolute to have fixed principles of action. The Greeks after the age of Alexander show these traits to a sickening degree. All ancient faith was gone ; prudential morality was the highest principle of character. The nobler men studied philosophy, and there was no field for them in the public world. The same feelings, especially that of sceptical despair, appear at Rome and greatly help on the corruption of society. Indeed, it would seem to be made out, both on historical and on *a priori* grounds, that all heathen religions are doomed to be destroyed by natural and moral philosophy revealing their inconsistencies with the physical world and with the highest principles of morals. It is idle to hope that political institutions which need support from religion and morals can maintain themselves when both give way.

The question must now be asked, whether the institutions of our modern society are so far independent upon faith and moral principle, that their energy could survive an age of atheism and profligacy ? Can modern society, in its superior wisdom and with the experience of the past all stored up for its use, be able to steer its way sagaciously and successfully without any religion at all ; and can morality have its due sway, when it is a mere conviction concerning what is wise and good, apart from the motives which the Christian religion presents to mind and heart ? On a subject requiring long discussion we can offer but one or two considerations.

The history of the past does not authorize the opinion that nations carry down within them any great amount of wisdom from one generation to another. At least they cannot be thought capable of doing this without carrying down with

Are the institutions of modern society self-sustaining ?



them correct moral judgments and moderation in action, which neither scepticism nor atheism can call forth. The progress of society brings with it new problems to solve. At present the problem of the future of the working-classes, of their principles and relations to property and government, is a very serious one, and becomes gloomy and alarming when the pressure of financial and commercial distress is felt. These classes have learned no wisdom, and can learn little but by coming under the control of moral and spiritual ideas. It was a part of the oath of the dikasts at Athens that they would not consent to the cancelling of private debts nor to the redistribution of land.\* Are the communists now any nearer to regarding such things to be flagitious than the ancient demagogues were; or any the less afraid to avow their hostility to the family institutions, to transmission of property by testament? Have we not seen in the present age an empire established, because the middle class was afraid of the actors in the revolution on this very account? The truth is that in addition to misgovernment and to calamities arising from the close connection of the parts of the world, which propagate their waves of commercial distress as if through the sky all abroad, we have new principles of justice, claims of absolute equality of condition through society, claims which so kindle the feverish brain of the depressed that nothing can lead them to patience and tranquillity save some of those Christian virtues which they have cast off. The tendency is not to the discharge of duties in these times, but to the enforcement of claims, which society cannot admit because they would be attended with immediate financial, social and political ruin.

Nor does it appear possible that a pure code of morals, per-  
Can there be pure  
morals without re-  
ligion? vading a community without religious faith to  
 support it, could have much ability to sustain  
 the fabric of society and of the state. A sway of pure morals  
 consists in this, that a just conception of character, a true  
 idea of a perfect life, should be so fixed in the minds of men,

\* Demosth. c. Timocrates, pp. 746, 747, §§ 149, 150.

that all the virtues, such as benevolence, moderation, self-restraint, self-sacrifice, should be called into exercise on the right occasion. But how can this standard be maintained when there are no considerations to support it, except those that are derived from prudence, and from the beauty of such a character itself? The single vice of intemperance, by its wide spread in the most intelligent countries and the best governed, shows that freemen, where facilities for pleasure in excess are within their reach, will exercise no self-restraint. Simple societies without great wealth, with substantial equality, run along in a smooth track; but when the relations of men in a community become complicated, when inequalities are continually arising from one cause or another, when a tendency towards excitement becomes a characteristic of a people, inordinate gratification is made the law of their life by many; nor have the rules of right nor the conceptions of a perfect life any power over those who are in the whirl of excess.

There is then a need, in advanced societies above all, of a principle which is not only regulative, but purifying and reformatory, which acts on character with a motive power, appealing, where it is received, to the leading forces in man's nature, to love gratitude hope as well as to the sense of right, by influences not abstract, but drawn from life and history—above all, from the life of one who can act by a personal sway over those who accept his authority and guidance. The union of the moral and spiritual in Christianity, and its appeals to universal principles in human nature, adapt it, if believed to be true, to be a controlling, permanent force in society. And as such, it can act on those to whom political power is entrusted, to make them fear God and serve the people, and on those who are under law, to make them obedient to law; to lessen crime, to bind the parts and orders of society together, to produce moderation and love of order; to call forth at once the sense of rights because it discloses the destiny of man, and the spirit of duty because its very basis is obligation. I do not say that Christianity can sustain, or that it ought to sustain, corrupt political parties; I do not say

that it will purify at once, or will even save from disintegration and ruin a corrupt society, nor that at any stage of human progress it will effect a perfect conformity between even a healthy society and its own idea. But I say that it is making all things new; and if it can act constantly within a society to raise and harmonize many of the members, a new order of things in the state will sooner or later follow. Aside from the assistance afforded to society and the state by this force, decay must come. How can mere prudence or self-interest repress the excesses of those who believe nothing and have no principle of right within them,—especially if they imagine that society has injured them, and if they hate it?

There is a celebrated passage in Plato's republic (v., 18, 473 D.) where Socrates is made to say that unless philosophers shall be kings in the cities, or kings and dynasts shall be well acquainted with philosophy, so that none but those who unite both of these properties shall have rule in the state; there will be no end of evils possible for states and for mankind. If by these expressions he would have us understand that the true philosopher—that is, the man of true wisdom and practical insight—must rule if the people are to be well governed, we may accept of them as true. And yet, like other opinions of Plato, they only give us half the truth. The conceited theorist in places of authority may do more harm than an ignorant man who follows the guidance of wise counsellors. And where is a corrupt state to find good rulers? Certainly they are not made such at home, for the corruption of society acts on all classes, on ruler as well as people. Nor can such a society be successful in discovering who will make good rulers. Or if they are found, and are in character above the men whom they govern, it is but a very little that they can do to stem the tide of general corruption; they retard the crisis of ruin rather than work reform. They are a very small force compared with the forces of evil in society and in constitutions. They die, and if they leave heirs of their own blood in their places, these are not certain to walk in their steps. The evils in society are likely to do more harm to a

ruler than he can do good. We need then a moral and spiritual force that shall pervade society, that can go downward as well as upward, that can produce an enlightened general opinion on the rights and the qualities of a good government and on the political duties of citizens; and that can fortify all this by the power of ennobling realities. Whether a particular government can be made better, or must be made over, cannot be told beforehand; but if the latter alternative is necessary, it can begin again with new sobriety under the control of moral and spiritual truth. It seems probable now, as we look back, that the Roman empire could not have been reformed; that the overturnings and disintegration effected by the German invaders were a necessary introduction to a new order of things. It would seem that in Christian communities, where the mass of the people were neither without faith nor without principle, but corruption had been long on the increase; some new putting forth of the power of purifying truths and principles could in time do away with the evil. But this we affirm, that decay of states and degradation of politics are necessary in old societies, where faith has become extinct and moral principle has lost its power; that the revived prevalence of Christian faith can raise a nation from its corruption, where this corruption has not run to an extreme; and that, where a catastrophe has come, that same POWER can in the end give a second, a reformed life to a people.







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